Nov 1. 78. Asgd — N. St. Lwayne

76 U.S. 1 - 450.
Oct. 3. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~813~~ 54

GEORGE HILL, JR., APPELLANT,

vs.

THE FARMERS AND MECHANICS' NATIONAL BANK.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 19, 1875.

Sup Ct Rule 13
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SUPREME COURT OF THE UNITED STATES.

No. 313.

GEORGE HILL, JR., APPELLANT,

vs.

THE FARMERS AND MECHANICS' NATIONAL BANK.

[APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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a *Authentication of record.*

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 16 day of October, 1875.

[SEAL.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, J'R,
Assistant Clerk.

1 *Bill of complaint.—Filed April 11th, 1874.*

In the supreme court of the District of Columbia, the 11th day of April, 1874. In equity.

THE FARMERS & MECHANICS' NATIONAL BANK of Georgetown, D. C.,
vs.
GEORGE HILL, JUNIOR, AND THE CHESAPEAKE & Ohio Canal Company.

No. 3688. Equity docket, 13.

To the supreme court of the District of Columbia, holding an equity court for said district:

The plaintiff complains as follows:

1. That it is an association duly organized for carrying on the business of banking in Georgetown, in said District, under the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, and the acts of Congress amendatory thereof.

2 2. That the above-named defendant is a citizen of said District, who, by his certain indenture, duly executed and delivered on the 15th day of January, A. D. 1864, and recorded in Liber N. C. I., No. 24, at folios 447 to 452, of the land records of the said District, did grant and convey to one Edward Shoemaker, of said District, and his heirs and assigns, all those several lots of ground lying in Georgetown aforesaid, and bounded and described as follows, viz:

That lot of ground situated at the northeast intersection of Water & Potomac streets, fronting twenty-three (23) feet on Water street, and running back of the same width, and binding on Potomac street sixty-one (61) feet; also that lot of ground east of and next adjoining said last mentioned lot, fronting likewise twenty-three (23) feet on Water street, and running back of the same width, and binding on said last described lot sixty-one (61) feet, each of said lots being improved by a three-story brick warehouse; also that lot of ground next north of the aforementioned lots, fronting on Potomac street nineteen and five-twelfths ($19\frac{5}{12}$) feet, and running eastwardly of the same width

3 seventy-one (71) feet to an alley, improved by a three-story brick house; also a lot of ground next above the last described, fronting seventy-one (71) feet on Potomac street, and extending back of the same width eastwardly seventy-one (71) feet to an alley; together with all and

singular, the buildings, improvements, rights, privileges, ways, and appurtenances to the same belonging, in trust to secure to Judson Mitchell and John Davidson, survivors of John Kurtz and others, trustees of "The Farmers & Mechanics' Bank of Georgetown," in said District, the sum of six thousand six hundred and thirty-one (6,631) dollars, for which the said defendant did pass to the said surviving trustees three (3) promissory notes, each dated on the 21st day of October, 1863, each for the sum of two thousand two hundred and ten and $\frac{33}{100}$ dollars, and payable, respectively, one (1), two (2), and three (3) years after date, with interest, to be paid semi-annually, said notes having been given for the
4 unpaid purchase-money for the premises hereinbefore described; in which said indenture it is provided that upon default being made in the payment of said indebtedness, it shall be lawful to sell said premises at public auction to the highest bidder for satisfaction of said indebtedness, all of which will appear from the original indenture of trust herewith filed and prayed to be made and considered a part of this bill of complaint, and marked "Exhibit F. & M. N. B., No. I."

3. That since the execution and delivery of the deed aforesaid, the said defendant hath converted the said real estate, premises, and buildings to the purposes of the manufacture of paper, affixing thereto machinery suitable therefor, and introducing therein, as motive-power, water-power from the Chesapeake and Ohio Canal under contracts made with the Chesapeake and Ohio Canal Company; it being in the contemplation of the defendant at the time of the purchase of said real
5 estate and premises and of his then grantors that such use should be made of them.

Plaintiff is advised that all the machinery and fixtures so annexed to said premises are covered by said deed of trust, and would pass by a sale thereunder. But plaintiff believes that said Hill claims the right to deal with the same as if not annexed to said mill, real estate, and premises, and is apprehensive that unless restrained by your honorable court he may attempt to remove the same.

4. That after the execution and delivery aforesaid, to wit, on or about the first day of February, 1872, the said promissory notes, and the amounts due thereon, became the property of said plaintiff for value, and are now held by it.

5. That the principal sum now due thereon is the sum of five thousand nine hundred and sixty seven and $\frac{90}{100}$ dollars, and that the interest thereon is due and unpaid since the twenty-first day of April, A. D.
6 1872; in addition thereto, there being now due by said defendant to said plaintiff the sum of one hundred and fifty dollars, by reason of the payment by said plaintiff for said defendant of insurance premiums upon the hereinbefore described premises.

6. That said debt being long since due, said plaintiff is advised that the said hereinbefore described real estate and premises, as also all improvements, machinery, water-power, and privileges should be sold for the satisfaction of said indebtedness.

7. That the marketable value of said premises depends, in great measure, upon the question whether the water-power now used in connection therewith is appurtenant to said premises, and the value of said security to said plaintiff depends in like degree upon the question whether said water-power would pass by a sale under said deed of trust, and said sale could hardly be made with complete justice to
7 either party until such question is determined.

And plaintiff is advised that such question cannot be determined without bringing said Chesapeake and Ohio Canal Company

into court and having their contract with said defendant, George Hill, junior, construed, and their relative rights in the premises determined by your honorable court, especially as your plaintiff is informed that said canal company does not admit that said water-power is appurtenant to said premises, and also claims that said Hill has forfeited the same by breaches of his said contracts with it.

Prayers.

The plaintiff therefore prays as follows:

1. That George Hill, junior, and the Chesapeake and Ohio Canal Company may be made parties defendant to this bill of complainant, and required to answer the allegations of the same.

2. That your honors ascertain and determine whether the said
8 water-power, by the lease or other agreements from the Chesapeake and Ohio Canal Company, is so made appurtenant to the premises aforesaid, that by a sale thereof under said deed of trust said water-power would pass and be transferred to a purchaser thereof.

3. That your honors will decree a sale of said real estate and premises, including said fixtures and machinery, and also said water-power, if in the opinion of your honorable court it should be an appurtenance to said premises aforesaid.

4. That in the mean time your honors will enjoin said Hill, defendant, from attempting to remove any of the machinery and fixtures as aforesaid.

5. That your honors will grant such other and further relief in the premises as may be just and equitable.

THE FARMERS AND MECHANICS' NATIONAL BANK
OF GEORGETOWN, D. C.,
By its President, H. M. SWEENY.

CHARLES M. MATHEWS,
Plff's Solicitor.

Sworn to and subscribed before me this eleventh day of April, 1874.
[NOTARIAL SEAL.] MAYHEW PLATER,
Notary Public.

Deed of trust.—Exhibit F. & M. N. B., No. I.—Filed April 11, 1874.

10 This indenture, made this fifteenth day of January, eighteen hundred and sixty-four, between George Hill, of the first part,
[Three dollars internal revenue cancelled stamp.] Edward Shoemaker, of the second part, and Judson Mitchell and John Davidson, survivors of John Kurtz,
[Forty cents internal revenue cancelled stamp.] Otho M. Linthicum, John Pickerell, John Myers, William Jewell, Joseph Smoot, and Clement Case, trustees of the Farmers and Mechanics' Bank of Georgetown, District of Columbia, of the third part, the said parties being all of the town last aforesaid.

Whereas the said George Hill is indebted to said trustees of the Farmers and Mechanics' Bank in the sum of six thousand six hundred and thirty-one dollars, for which he has passed his three several promissory notes, each for the sum of two thousand two hundred and ten $\frac{33}{100}$ dollars, bearing date the 21st day of October, 1863, and payable one, two, and three years after said date to the order of said Judson
11 Mitchell and John Davidson, survivors as aforesaid, with interest to be paid semi-annually; said notes having been given for the unpaid purchase-money for the premises hereinafter described;

and whereas the said George Hill, being desirous to secure the payment of said notes according to the term and tenor of his purchase of said premises, has agreed to execute this instrument of writing:

Now, therefore, this indenture witnesseth that he, the said George Hill, in consideration of the premises, and of the sum of five dollars current money *money* to him in hand paid by said Edward Shoemaker, at the execution of these presents, the receipt of which is hereby acknowledged, has granted, bargained, sold, assigned, released, enfeoffed, and confirmed, and by these presents grants, bargains, sells, releases, assigns, enfeoffs, and confirms unto the said Edward Shoemaker, his heirs and assigns, all those several lots of ground lying in George-
12 town aforesaid, and bounded and described as follows, viz:

That lot of ground situated at the northeast intersection of Water and Potomac streets, fronting twenty-three (23) feet on Water street and running back of the same width and binding on said Potomac street sixty-one (61) feet; also that lot of ground east of and next adjoining said last-mentioned lot, fronting likewise twenty-three (23) feet on Water street and running back of the same width and binding on said last-described lot sixty-one (61) feet, each of said lots being improved by a three-story brick warehouse; also that lot of ground next north of the aforementioned lots, fronting on Potomac street nineteen feet five inches (19.5), and running eastwardly of the same width seventy-one (71) feet to an alley, improved by a three-story brick house; also a lot of ground next above the last-described, fronting seventy-one (71) feet on Potomac street and extending back eastwardly of the same width
13 seventy-one (71) feet to an alley, together with all and singular the buildings, improvements, rights, privileges, ways, and appurtenances to the same belonging: To have and to hold the same unto the said Edward Shoemaker, his heirs and assigns, to his and their use, in trust, however, for the following objects and purposes, and none other, that is to say:

If the said George Hill shall well and truly pay or cause to be paid at maturity the promissory notes aforesaid, and all instalments of interest when payable, and keep or cause to be kept the covenants hereinafter contained, then on said payments being completed and covenants discharged, the said Edward Shoemaker, or his heirs, shall release and reconvey said granted premises to the said George Hill, his heirs and assigns, at his and their cost; and until some default in regard to such payments or covenants, it shall be lawful for the said George Hill, his heirs and assigns, to retain and enjoy the possession, use, and income of said granted premises.

14 But on any default as to such payments or covenants, and as often as the same may occur, it shall be lawful for the said Edward Shoemaker, or his heirs, to sell such granted premises at auction, at such time, on such terms, and after such previous advertisement in any convenient newspaper as to the party advertising shall seem reasonable and best for the interests of all concerned; and such sale to repeat in like manner as often as may be necessary to satify the objects of this trust; and on full payment of the purchase-money to convey the premises sold to the purchaser, his heirs and assigns, at his or their cost, and the proceeds arrising from any and every such sale to apply in the first place to defray the reasonable expenses of this trust, including the usual allowances to trustees; secondly, to pay to the party entitled to receive the same whatever shall remain owing on the
15 notes aforesaid, for principal, interest, or expenses, or for taxes, or insurance, paid as hereinafter provided; and, lastly, any sur-

plus to pay over to the said George Hill, his executors, administrators, or assigns.

And the said George Hill hereby, for himself, his heirs, executors, and administrators, covenants and agrees with the said Edward Shoemaker, his heirs and assigns, that during the continuance of this trust he will cause all taxes and public dues, chargeable or to become chargeable against said premises, to be punctually paid; and that he will cause the buildings thereon to be kept constantly insured against loss by fire to the amount at least of three thousand dollars in some insurance office of good credit, and the policy to be in the name or assigned to the use of the said Edward Shoemaker, or his heirs, subject to the trusts of these presents,
16 and that on any failure therein it may be lawful for the holder of said recited notes to pay such taxes or effect or continue such insurance, and the cost thereof with interest shall become a debt of the said George Hill, his heirs, executors, administrators, or assigns, to the party incurring the same, presently due and payable, and the payment whereof shall stand secured by these presents, with all remedies for collecting the same equally as if the same were included in any such note aforesaid and such note were in arrears and unpaid.

In testimony whereof the said George Hill has hereunto set his hand and seal the day and year first above written.

GEORGE HILL, J'R. [SEAL.]

Signed, sealed, and delivered in our presence, the word "twenty" having been erased and "thirty" inserted on first page.

JENKIN THOMAS.
JOHN GARRETT.

17 DISTRICT OF COLUMBIA,
Washington County, to wit:

I, Jenkin Thomas, a notary public in and for the county and District aforesaid, duly commissioned and qualified, do hereby certify that George Hill, a party to a certain deed bearing date the fifteenth day of January, 1864, and hereto annexed, personally appeared before us in the county aforesaid, the said George Hill being personally well known to me to be the person who executed said deed, and acknowleged the same to be his act and deed.

Given under my hand and official seal this 15th day of January, 1864.

[NOTARIAL SEAL.] JENKIN THOMAS.

Rec'd January 22d, 1864, and recorded in liber N. C. T., No. 24, folios 447 to 452 inc., one of the land records of Washington County and District of Columbia.

18 *Subpœna to answer.*

In the supreme court of the District of Columbia, April 11th, 1874.

FARMERS & MECHANICS' NATIONAL BANK OF Georgetown, D. C., complainant, *against* GEORGE HILL, J'R, ET AL., DEFENDANT. } No. . Equity docket.

The President of the United States to the Chesapeake and Ohio Canal Company and George Hill, j'r, defendant:

You are hereby commanded to appear in this court at its first special

term, occur'ing twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment and such other process of contempt as the court may award.

Witness.

D. K. CARTTER,
Chief Justice.
R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Ass't Clerk.

MEMORANDUM.—That the defendant is to enter its appearance in this suit in the clerk's office on or before the special term to which
19 this writ is returnable; otherwise the bill may be taken for confessed.

Served on both.
April 13th, 1874.

A. SHARP, *Marshall.*

Service acknowledged for C. & O. C. Co.

W. S. COX.

20 *Answer of George Hill, j'r.—Filed June 2d,* 1874.

In the supreme court of the District of Columbia. In equity.

THE FARMERS & MECHANICS' NATIONAL BANK of Georgetown, D. C., *vs.* GEORGE HILL, J'R. } No. 3688. Docket 13.

Separate answer of George Hill, j'r.

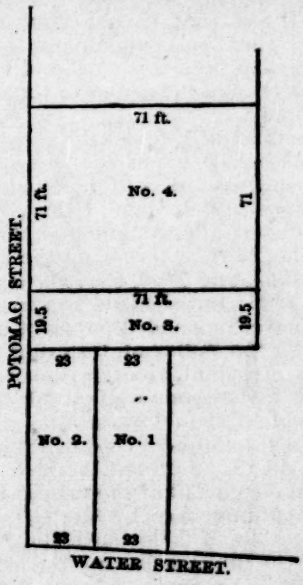
Answering said bill, I say:

1. I believe them to be true, and, therefore, admit the allegations of the first paragraph of said bill of complaint.

2. I admit the execution of the deed of trust set forth in the second paragraph of said bill of complaint, but deny that its provisions are fully or sufficiently set forth in said paragraph, and say that the powers of the trustee are, among others, to repeat the sales as often as may be necessary to satisfy the objects of said trust; and I also refer to said deed as a part of this my answer, subject, nevertheless, to the agreement and modification of its terms hereinafter set forth.

21 3. I deny the allegations of the third paragraph in respect to the last described lot forming much more than one-half of the whole property, to wit, about five-ninths of the whole, being embraced in the property devoted or converted to the purposes of a manufactory of paper; and say that said lot described as No. 4 in the plat of the whole, herewith filed, is wholly unnecessary to and is disconnected from said paper factory.

Def't's exhibit with answer.



No. 1 has 1403 sq. f't.
" 2 " 1403 " "
" 3 " 1379 " "

Total...4185 " "
No. 4 has 5041 " "

9226 " "

F. & M. N. B'K
vs.
GEORGE HILL, J'R. } No. 3688. Equity docket 13.

I admit that the motive-power of said paper-mill is water introduced from the Chesapeake and Ohio Canal; but I deny that all
22 of the machinery and fixtures annexed to said premises are covered by said deed of trust, and say that some parts of the said machinery and fixtures can and may be removed without damage to the freehold or the bulk of the machinery, and leave the premises in as good order and condition as the same were when the said deed of trust was executed; that some of said machinery was placed in and upon said premises years after the execution of said deed of trust, and is movable property, and not permanently affixed to said freehold, and were placed therein simply and solely by this defendant for the prosecution of his own special and particular business, and for no other purpose; and I admit that I claim, and have the right, that I may and can deal with the same as I can with any other personal property of my own.

23 4. I am ignorant of the allegations of the fourth paragraph of the bill as to the transfer of said promissory notes to the complainant being regular and legal, and shall insist upon the full proof of the same; and I further say that if such transfer shall upon proof be found regular and legal, that the complainant took the same subject to all the equities in respect to the notes aforesaid between this defendant and the original payees of said notes and to the operation of the agreement hereinafter mentioned.

5. I admit that there is unpaid upon said notes the sum of $5,967.90, and that no interest has been paid on the same since April 21st, 1872; but I say that the reason therefore is to be found in the oppressive and vexatious conduct of the complainant. I deny that the principal sum of said notes is due as alleged, and say that although the notes
24 matured, according to their terms, on the 21st day of October, in the years 1864, 1865, and 1866, the last one maturing on the 21st day of October, A. D. 1866; but the said trustees of the old Farmers and Mechanics' Bank never demanded payment of the principal sum of said notes, and pursuing the policy of fostering manufactories in the town, through its then president, George Shoemaker, agreed with the defendant that after he had become well established in business and felt able to do so, this defendant should curtail the principal debt; that the complainant itself, by a resolution (a copy of which was received by this defendant), some time in 1872 required this defendant, in pursuance of such agreement, to make a curtail of the principal amount of said notes ten (10) per centum per annum in each year; that in 1872 this defendant, for the first time able to make such curtailment, this defendant,
25 after paying all the interest due up to April 21st, 1872, on the 5th day of July, 1872, in pursuance of such resolution, passed according to said agreement, paid the said complainant ten per centum of the principal debt of said notes then unpaid, namely, $663.10; that said complainant received the same, giving this defendant credit therefor, as this defendant alleges in pursuance of said agreement and resolution, which the complainant then recognized as binding upon it, and was running with the transfer of said notes to it; that about the 21st day of April, 1873, the said complainant, in pursuance of said agreement, sent a bill to this defendant, in which it only demanded the interest upon said principal debt then unpaid, and did not demand the annual curtailment, because it was not due until July 5th, which said interest would have been paid but for the hasty and precipitate action of
26 the complainant in advertising the property for sale and attempting to evade the force and operation of said agreement; that, according to the said agreement, another curtailment would have become payable on the 5th of July, 1873, and this defendant was ready and willing to pay, but the complainant, by its new president (George Shoemaker having died), had taken such uncalled for and oppressive measures against this defendant, that litigation ensued between said complainant and this defendant respecting said property, which was not ended until some time in the present year; that shortly after the substantial ending of said litigation, but before a final decree had been entered therein, viz, on the 23d of April, 1874, this defendant addressed to the complainant a letter as follows, viz:

GEORGETOWN, D. C., *April 23d*, 1874.

To the pres't & board of directors of the Farmers & Mechanics' National Bank, Georgetown, D. C.:

27 GENTLEMEN: The ten per cent. annual curtailment upon my notes given for the deferred payments upon my mill property,

corner of Water & Potomac streets, which fell due, according to my understanding of our agreement, on the 5th of July, 1873 (the former one having been paid July 5th, 1872), was not paid because of the litigation then pending, which is now ended, and I now offer to pay you that curtail of ten per cent., and also all interest due up to the 21st of April, 1874, and will promptly on the 5th of July next make the payment of the annual curtail then becoming due, agreeably to the understanding I had with your bank when the first curtailment was made.

I hope this offer will commend itself to you, and that I may be notified of your action upon it to-day.

Very respectfully,
(Signed) GEORGE HILL, J'R.

The complainant intending thereby to carry into full effect the
28 said agreement respecting the annual curtailment of the principal debt of said notes made by this defendant and the first holder of said notes, and burdened with which agreement the said notes passed, if at all, to said complainant; that instead of accepting the defendant's proposition, the said complainant declined the same in the following terms (the original of which will be produced and read on the hearing of this cause), which letter was received about the day it bears date, viz:

GEORGETOWN, D. C., *April 23d*, 1874.

M'r GEORGE HILL, j'r:

D'R SIR: Your communication of this date, addressed to the president & directors of the Farmers and Mechanics' National Bank of Georgetown, D. C., has been referred to me with instructions to respectfully decline the propositions therein made, in the manner in which made.

Please consider this note as your notice of their action in the premises.

29 Respectfully,
(Signed) CHARLES M. MATTHEWS.

That said defendant is willing and ready, and hereby tenders to the complainant whatever sums may be required to pay and discharge all interest due upon said principal debt up the 21st of April, 1874, and also all sums that may have been required for insurance upon said property, as well as the installment, or annual curtailment, due according to said agreement on the 5th day of July, 1873; and shall insist that said agreement is in full force, and obligatory upon the complainant as well as this defendant.

6. I deny the allegations of the 6th paragraph of said bill of complaint.

7. I deny the allegations of the 7th paragraph of said bill of complaint.

And, having fully answered, I pray to be hence dismissed with reasonable costs.

I, George Hill, j'r, do solemnly swear that I have read the fore-
30 going answer by me subscribed, and know the contents thereof, and that the matters and things stated upon my personal knowledge are true, and those stated on information and belief I believe to be true.

GEORGE HILL, J'R.

Subscribed and sworn to this day of June, A. D. 1874, before me.
[NOTARIAL SEAL.] CHARLES WALTER,
Notary Public.

31 *Replication.—Filed June 11th, 1874.*

In the supreme court of the District of Columbia, the 11th day of June, 1874.

THE F. & M. NAT. BANK OF GEORGETOWN, D. C., *vs.* GEORGE HILL, JUNIOR, ET AL. } No. 3688. Eq. docket, No. 13.

The complainant hereby joins issue with the defendant, George Hill, j'r, upon the bill & the answer of said defendant Hill, and such testimony as may be taken under the rules of the court.

CHARLES M. MATTHEWS,
For Plf'ts.

32 *Order of reference to auditor.—Filed July 7, 1874.*

In the supreme court of the District of Columbia, the 7th day of July, 1874.

FARMERS AND MECHANICS' NAT. BANK OF Geo'town, D. C., *vs.* GEORGE HILL, JUNIOR, ET AL. } 3688. Equity docket, 13.

Ordered by the court, this 7th day of July, 1874, that this cause be referred to the auditor to ascertain and report the indebtedness of George Hill, junior, to the plaintiff; to report the value of the real estate, improvements, milling machinery & fixtures, and water privileges, in the proceedings in this cause mentioned & referred to; and to hear and report testimony as to a certain agreement alleged by said Hill to have been made with one George Shoemaker, as appears from paragraph five (5) of said Hill's answer, filed June 2, 1874, in this cause.

By the court.

A. W.

33 *Report of auditor.—Filed Nov. 5, 1874.*

In the supreme court of the District of Columbia. In equity.

THE FARMERS AND MECHANICS' NATIONAL Bank of Georgetown, D. C., *vs.* GEORGE HILL, J'R, ET AL. } No. 3688. Docket 13.

This cause has been referred to the auditor, with the following directions:

"To ascertain and report the indebtedness of George Hill, junior, to the plaintiff; to report the value of the real estate, improvements, milling machinery and fixtures, and water privileges, in the proceedings in this cause mentioned and referred to; and to hear and report testimony as to a certain agreement alleged by said Hill to have been made with one George Shoemaker, as appears from paragraph five (5) of said Hill's answer, filed June 2, 1874, in this cause."

John M. Sweeney and Esau Pickrell have been produced before me as witnesses on behalf of the complainant, and George Hill, j'r, as
34 a witness for the defendants. The testimony of said witnesses has been taken, and their depositions are hereto attached.

I.

The indebtedness of George Hill, j'r, to the plaintiff is admitted in the testimony annexed hereto (p. 17) to be $5,967.90, with interest thereon from April 21, 1872. The interest on this sum, to the date of this report, amounts to $909.11. There is also due from Hill to the plaintiff, as admitted in the annexed testimony (p. 16), the further sum of $150 for insurance. The total indebtedness, therefore, of the said George Hill, j'r, to the complainant at this date is $7,270.01.

II.

No witness has been produced before me who has testified as to the value of the real estate, improvements, milling machinery and fixtures, and water privileges mentioned in the proceedings; but the printed paper introduced in evidence, and marked "Exhibit A," contains the testimony of a number of witnesses touching the value of the
35 property mentioned. Its value is variously estimated by the said witnesses.

David L. Shoemaker (Exhibit A, p. 6) estimates the value of the entire property, including the water privileges, at $80,000; William Clabaugh (p. 8) at $86,013; William T. Duval (p. 10) at $120,000; and Edwin D. Hartley (p. 13) at $37,000. Taking the mean estimate, which is the usual rule in such cases, the estimated value of the whole property would be $80,753.25.

The first-named witness estimates the value of the water privileges at $4,300 per annum, the second at $4,368, and the third at $6,600. The fourth witness makes no separate estimate of the value of the water privileges. Here, again, taking the mean estimate, the value of the water privileges would be $5,089.33 per annum.

III.

I am directed by the order of reference "to hear and report testimony as to a certain agreement alleged by said Hill to have been made
36 with one George Shoemaker, as appears from paragraph five (5) of said Hill's answer, filed June 2, 1874, in this cause."

The only witness who testified before me directly in relation to said agreement is George Hill, j'r. His deposition is contained in the testimony hereto annexed.

See, also, deposition of said Hill in Exhibit A (pp. 14 to 25), and affidavit of the directors of the Farmers and Mechanics' National Bank of Georgetown, D. C., filed June 10, 1873, in the case of George Hill, j'r, vs. Edward Shoemaker et al., being equity cause No. 3214, docket 12, all the papers in which have been introduced in evidence in this cause.

November 5, 1874.

R. LEACH,
Auditor.

37 In the supreme court of the District of Columbia.

FARMERS AND MECHANICS' NATIONAL BANK of Georgetown, D. C., *vs.* GEORGE HILL, J'R, ET AL. } No. 3688. Eq. doc. 13.

Deposition of witnesses produced, sworn, and examined in the above-entitled cause before the auditor of said court, on the 15th day of July, 1874, under an order of reference dated July 7th, 1874.

HENRY M. SWEENEY, a witness of lawful age, being duly sworn, deposes and says:

My name is Henry M. Sweeny. I reside in Georgetown, D. C.

By M'r Matthews:

Q. You are president of the Farmers and Mechanics' Bank of Georgetown, D. C.?

A. I am.

Q. And you were the president of the late Farmers and Mechanics' Bank of Georgetown, D. C.?

A. I was the president of that bank up to the time of its conversion into a national bank.

38 Q. Do you know the notes given to the trustees of the old bank by George Hill, j'r, secured by the deed of trust filed in this cause?

A. I do.

Q. At the time of the conversion of the old bank into the new, were these notes the property of the old bank?

A. They were.

Q. For what had they been given to the old bank?

A. For the deferred payments on the property described in the deed of trust, which was purchased from the old Farmers' and Mechanics' Bank by the defendant, Hill.

Q. How were the assets of the old bank, real and personal, transferred to the new bank?

A. The assets, both real and personal, of the old Farmers' and Mechanics' Bank were transferred by the resolution of the directors of the bank to the Farmers' and Mechanics' National Bank. I file herewith a copy of the resolution referred to.

(Paper marked "H. M. S., No. 1.")

39 *Copy of resolutions.—H. M. S., No. 1.*

THURSDAY, *Jan. 11th*, 1872.

Present Mess'rs, Sweeny, Magee, Pickrell, Wheatley, Davidson, and Mathews.

On motion, it was resolved:

Whereas, a majority of the stockholders of the Farmers' and Mechanics' Bank, representing seven eight's of the stock, have given their written consent (in every case when called on) to have the bank changed into a national bank:

Therefore be it resolved, that the personal and real property of the bank be transferred to the Farmers' and Mechanics' National Bank, of Georgetown, D. C., and that the law-officer of the bank, in connection

with C. M. Matthews, be requested, and they are hereby authorized, to prepare the papers found to be necessary for that purpose.

(Signed) E. LYONS, *Secretary.*

The above is a true copy from the records of the minutes of the proceedings of the board of directors of the Farmers' and Mechanics'
40 Bank, of Georgetown, D. C.

As witness my hand and seal notarial this 15th July, 1874.

[SEAL NOTARIAL.] MAYHEW PLATER,
Notary Public.

Q. Were the personal assets of the old bank transferred to the new under that resolution; and, if so, when?

A. They were transferred under that resolution about February 1st, 1872. The real assets were transferred by deed dated February 10th, 1872, filed for record February 13th, 1872; recorded in liber 670, folio 361, one of the land records of Washington County, District of Columbia.

Q. Has the defendant, Hill, made payments to the Farmers' and Mechanics' National Bank since its organization?

A. He has. On May 16, 1872, he paid or caused to be paid $66\frac{31}{100}$ on account of interest; July 5th, 1872, he paid $663\frac{19}{100}$ on principal.

41 Q. Has he claimed and received credit for those payments?

A. He received credit for those payments, and I recollect that he claimed that the credit should be applied to one of the notes.

Q. Has the defendant, Hill, communicated with the new bank since its organization as the holder of these notes?

A. He has several times.

Q. What is the amount of the indebtedness secured by the deed of trust?

A. The amount of the indebtedness is $\$5,967\frac{99}{100}$, with interest from April 21st, 1872.

Q. Is there any insurance money that has been paid by the bank on Hill's account on this property?

A. To the best of my recollection, there has been paid by the bank about one hundred and fifty dollars on this property, about two years' insurance.

H. M. SWEENY.

Sworn to and subscribed before me this 15th day of July, 1874.

R. LEECH,
Auditor.

42 The complainant, by its counsel, Charles M. Matthews, esq., here offers in evidence the printed records of the Supreme Court of the United States in the case of George Hill, j'r, vs. The Chesapeake and Ohio Canal Company, No. 739, chancery docket No. 8 of the supreme court of the District of Columbia, No. , December term of the Supreme Court of the United States. And also the proceedings in the case of George Hill, j'r, vs. The Farmers' and Mechanics' National Bank of Georgetown, No. 3214, equity docket 12 of the supreme court of the District of Columbia, and the printed book containing the testimony taken therein.

To the introduction of each and all of which papers in evidence the defendant, Hill, by his solicitor, F. W. Jones, objects.

R. LEECH,
Auditor.

43 *Certificate to record.*

CLERK'S OFFICE SUPREME COURT
OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that the originals, of which the following writings are true and complete copies, are on file and of record in the clerk's office of said court, and that said originals together constitute the record of the proceedings of said court in a certain cause therein depending, and lately decided, entitled George Hill, j'r. vs. The Chesapeake and Ohio Canal Company. No. 739. Equity docket 8.

In testimony whereof I hereto subscribe my name and affix the seal of said court this 10th day of December, 1870.

[SEAL.] R. J. MEIGS, *Clerk, &c.*,
By R. J. MEIGS, J'R, *Ass't Clerk.*

Original bill.—Filed July 30, 1866.

To the honorable judges of the supreme court of the District of Columbia, sitting in equity.

The bill of complaint of George Hill, j'r, a citizen of Georgetown, in said District, against the Chesapeake and Ohio Canal Company, a corporate body, having a habitat in said District, and against its agents and servants, whom your orator prays may be made defendants to this his bill of complaint, humbly shows to your honors:

That your orator is the owner of a paper-mill in Georgetown, at the corner of Potomac and Water streets, the motive power therein being water flowing from the canal, the property of said defendant, in which said mill, and in fitting the same for useful mechanical purposes, your orator has invested large sums of money, to wit, the sum of forty thousand dollars.

That by certain articles of agreement, bearing date the 21st day of January, 1864, made and entered into between the said defendant and your orator, it was agreed that your orator, for the term of twenty years from and after the 1st day of July, A. D. 1864, should be at liberty to draw off from the said canal two hundred square inches of water, to be used for propelling the machinery of said paper-mill, at a certain stipulated price, to wit, $500 per annum for the first ten years and $600 for the other ten years of said term, payable quarter yearly; that the said articles of agreement were made and entered into several months in advance of the erection of said paper-mill and the machinery therein, which erection was done and made by your orator in the confidence that said water-power would be secured to him at said mill.

That your orator has fully complied with the provisions in said articles of agreement by him to be done and performed, and that the waste of water, upon which the defendant claims the right to inflict the grievance and damage to your orator, hereinafter complained of, is not owing to any of the contingencies in which, by the articles of agreement, the said defendants are authorized to diminish or stop the supply of water, but is owing exclusively to the inaccurate and erroneous measurement of the water, insisted upon by said defendants.

That by a resolution made and passed on the 20th day of April last, by the board of directors of the said canal company, it was resolved
44 that your orator should be at liberty to draw from said canal whatever quantity of water might be necessary to propel the ma-

chinery in his said paper-mill, at and upon a certain stipulated bonus and rent per inch, and your orator avers that he always was ready and willing, and here proffers himself ready and willing to pay the stipulated bonus and rent per inch for the quantity additional to said two hundred inches, if any, so drawn off by him for the purposes aforesaid.

That by a certain other resolution of said board made and passed on the 20th day of February, 1865, the said defendants resolved and agreed that the guage to measure the quantity of water used by this and other mills drawing water from said canal should be placed at the most convenient point to give the mills the full quantity of water for which they were paying, and that your orator declined to accept the lease or grant of said water-power until the passage of said last-named resolution, which was passed at your orator's request and instance, and the same entered into and became a portion of the aforesaid articles of agreement.

That the water used by your orator is carried a distance of from 350 to 400 feet from the said canal to your orator's mill, so that the loss by friction is such that at the point of discharge of said water at the wheels of your orator's mill the quantity of water is but 108 inches instead of the 200 inches so as aforesaid granted to him, and which he claims he is entitled to have at the point where the water first becomes of utility to him; and that the said quantity of water, reduced as the same would be by the system of measurement practiced and claimed as correct by said defendant, would be insufficient to propel the machinery of said mill.

That your orator has paid in full for the use of said water up to and including the quarter year ending on the 31st day of March, A. D. 1866, as by reference to the voucher therefor, herewith exhibited as a part hereof, marked "G. H., j'r, No. 2," and has offered to pay to the duly authorized collector for said defendant the sum due for the quarter year ending on the 30th day of June last, to wit, the sum of one hundred and twenty-five dollars (and this amount he brings into court, and here tenders the same to said defendant), according to said articles of agreement, but that the said collector refused to receive the same unless your would also pay the further sum of two thousand eight hundred and sixteen $\frac{67}{100}$ dollars, the said collector stating that he was instructed by the officers of said defendant to claim this additional sum for and upon account of five hundred inches of water (additional to the two hundred) which the said defendant alleges that your orator is now drawing off from said canal, and using in the propulsion of the machinery at said paper-mill, the said sum of $2,816.67 being made up by charging as bonus five dollars per inch, and as rent two $\frac{50}{100}$ dollars for the use of said additional five hundred inches of water.

That your orator avers and charges that a proper admeasurement of the water used by him at his said mill, if made at the point of discharge, will show that your orator is using but one hundred and eight (108) inches of water—much less than he is entitled to use according to said articles of agreement—and that the water from said canal used by the other mills in Georgetown is measured at the point of discharge at the wheels; and that even if the measurement is made at the opening of the trunk at the canal itself, no such extraordinary quantity of water can possibly be drawn off or used by your orator, and that the claim of the defendant, that your orator is drawing the enormous amount of seven hundred inches of water, is the result of grossly inaccurate
45 measurement, and at an improper place for such measuring; that the guage by which the said defendant pretends to measure the

quantity is of such character and so placed as that it is impossible for more than one hundred and thirty (130) inches of water to pass through the same, and that if the said *guage* were placed at the point of discharge, that no greater quantity of water than 130 inches would pass the same.

That all of the machinery of said paper-mill was constructed in contemplation of the power of two hundred inches of water, and being upon the most approved and scientific pattern, that quantity is more than sufficient to propel the same, the uttermost capacity of the wheels at your orator's said mill being only one hundred and eight (108) inches, but that the officers of the said defendant inaccurately and erroneously assert that your orator is drawing off and using seven hundred inches of water at your orator's said mill, and seek to enforce from him the payment of the large sum of money aforesaid for said additional quantity of water; and upon your orator's refusing to pay said sum of money, the said defendant, by its agent, John Cameron, notified your orator that he should stop and entirely cut off the supply of water to your orator's mill, and thereby inflict irretrievable injury and irreparable damage to your orator, and the said John Cameron attempted so to do on the 19th day of July instant, but was prevented from so doing by your orator in person defending the spot, and your orator is apprehensive that the said defendant will cut off and stop the supply of water aforesaid, which will work irretrievable injury and damage to your orator, for which no adequate compensation can be made him, inasmuch as your orator would be compelled to suspend his daily work and business, and would be unable to fill and furnish contracts and undertakings with his customers, some of whom are publishers of newspapers in this District, the daily issues of which are dependant upon the continuance of your orator's said business, and your orator is remediless by law in the premises, the said defendant being insolvent.

In consideration thereof your orator prays that your honors will issue the United States writ of injunction against the said defendant, prohibiting, enjoining, and restraining the said defendant, its agents and servants, from molesting, interrupting, or diminishing the supply of water to your orator's paper-mill in Georgetown, and that your orator may have such other and further relief as the case may require and to your honor seems meet, &c.

And as in duty, &c., your orator will ever pray, &c.

JONES & ASHFORD,
Solicitors for Complainant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

On this 21st day of July, 1866, personally appeared George Hill, j'r., and made oath that the matters and things stated in the foregoing bill are true to the best of his knowledge & belief.

Before me.

M. V. BUCKLY, *J. P.* [SEAL.]

Exhibit to bill.—"*G. H., j'r, No.* 1."

Articles of agreement made and concluded this twenty-first day of January, in the year eighteen hundred and sixty-four, by and between the Chesapeake and Ohio Canal Company, of the one part, and
46 George Hill, j'r., of Washington County, *with* District of Columbia, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the rents and covenants hereinafter mentioned, and on the part of the said party of the second part to be paid and performed, doth grant and agree, to and with the said party of the second part, and his assigns, that the said party of the second part, and his assigns, shall have full right, permission, and authority, for the term of twenty years, from the first day of July, in the year eighteen hundred and sixty-four, and the same is hereby granted, to draw off from the Chesapeake and Ohio Canal at Georgetown, to be used at his property, at the corners of Potomac & Water streets (from the level between locks No. four and No. five), so much water as will pass through an aperture of two hundred square inches in an iron plate not exceeding an half inch in thickness, to be used solely for propelling the machinery of a paper-mill and appurtenant works; but on these express conditions, viz:

1st. That the said ape'ture shall form an opening in said plate of as many inches in height and as many inches in length, in the clear, as may be necessary to make out the number of square inches aforesaid (200), two hundred.

2nd. That the said ape'ture shall be so placed that its lower edge shall not be nearer to canal bottom proper than two feet.

3rd. That the said ape'ture shall be made plain and square through the said plate, and that no device or contrivance shall ever be made therein, or in any way attached to or connected therewith, whereby a greater quantity of water can be drawn through the said ape'ture than if such device or contrivance had not been connected with or attached to the same.

4th. That a sliding gate or gates shall be placed in front of the said ape'ture so that the whole water-power hereby granted may be, as occasion under the provisions of this contract requires, entirely or partially stopped from passing through it.

5th. That the forebay or trunk for conducting the said water through the canal-bank from the said ape'ture shall be covered or bridged, and, together with the said ape'ture and sliding gate or gates, shall be so constructed and put in as not to prevent or interfere with, in any degree, the navigation of the canal, or the use of the towing path thereof; and that the said forebay or trunk, cover or bridge, ape'ture and sliding gate or gates shall be of good and substantial construction, and shall not occasion any leakage of the said canal, or in anywise endanger the security thereof, and shall be put down and constructed, and thereafter, during the continuance of the said term, kept in repair at the sole cost of the said party of the second part, or his assigns, under the special direction and superintendence, and subject, in every particular, to the approval of such officer of the said party of the first part as may be charged with that duty.

6th. That, in like manner, at the sole cost of the said party of the second part, or his assigns, and under the special direction, superintendence, and approval of such officer of the said party of the first part as may be charged with that duty, shall such alterations from time to time be made in the said forebay or trunk, cover or bridge, ape'ture and sliding gate or gates as may be considered necessary by the said party of the first part, or their officer charged with that duty, to prevent or lessen the inconvenience to the navigation of the said canal, and the use of its towing path, which may be found to arise from the use of the said water, or that may be thought necessary by

time to time, as the said renewed lease or contract shall
47 the said party of the first part for the greater security of the said canal, or of its works.

7th. That the officers and servants of the said party of the first part, with their horses and carts, shall have free ingress and egress to and from the premises used and occupied by the said party of the second part or assigns, at the point aforesaid, for the purpose of examining, repairing, and preserving the embankments and other parts of the said canal or its works without molestation or hinderance from any person whatever, and that the said officers and servants shall, in like manner, have free ingress and egress for the purpose of examining any and all the fixtures and works connected with the drawing off of the said water from the canal at the point aforesaid, for the purpose of ascertaining whether any defects exist therein which may occasion leakage from the said canal or endanger its security, or that of its works, or whether, from any cause whatsoever, there may be more water drawn off from the said canal than is hereby granted.

8th. That the said party of the first part shall be at liberty, whenever it shall be requisite, in the opinion of their officer charged with such duty, to draw off the water from the said canal for the purpose of cleaning, repairing, or altering the same, or for any other necessary purpose, and shall also be at liberty to keep the water out of the said canal after the occurrence of a breach or breaches in it, or the failure of any of its works, for the purpose of its or their repair, without rendering the said party of the first part or their officers in any manner liable for damage for the failure of water at the point aforesaid, while such cleaning, repairing, or alteration is in progress, or such necessity exists, or during the repairs rendered necessary by such breach or breaches, or failure, and without subjecting the said party of the first part to any forfeiture of rents, unless the water should be so drawn off or remain out for a connected period of at least ten days; then, and in all such cases, a pro rata deduction shall be made from the rent for the days during which the water is so drawn off or remains out.

9th. That whenever the said party of the second part or his assigns suspend the use of the water-power hereby granted in propelling his or their machinery, the aforesaid sliding gate or gates shall be tightly closed by him or them, and shall so remain tightly closed until he or they have occasion to resume the use of the said water-power, (without being entitled in consequence to any abatement of rent,) in order that there shall be no unnecessary waste or leakage of water.

And the said party of the second part, in consideration of the premises, for himself and his assigns, doth covenant and agree to and with the said party of the first part that he and his assigns, during the continuance of the said term of years commencing on the first day of July, in the year eighteen hundred and sixty-four as aforesaid, will pay for the use of the said water to the said party of the first part an annual rent of five hundred ($500) dollars for the first ten years of the aforesaid term, and an annual rent of six hundred ($600) dollars for the succeeding ten years of said term, in equal quarter-yearly payments, viz: on the thirty-first day of March, thirtieth day of June, thirtieth day of September, and thirty-first day of December, in each and every year, and will abide by and perform each and all the conditions and stipulations on his or their part to be performed under the aforegoing provisions.

And it is hereby mutually understood and agreed, by and between the said parties, that if any quarter-yearly payment of the said rent

shall be in arrear twenty days after the period aforesaid stipu-
48 lated for the payment of the same, or if the said party of the second part and his assigns shall fail to comply forthwith, upon being required so to do by the party of the first part or their officer charged with that duty, with any of the preceding conditions of the lease, or shall alter or enlarge the said forebay, or trunk, or ape'ture, or shall apply the water passing through the same to any other use or purpose than as aforesaid, without the special consent of the said party of the first part, signified in writing, under their seal, then, and in either case, it shall be lawful for the said party of the first part, or their officer charged with that duty, to stop or cut off the supply of water at the point aforesaid, by closing the sliding gate or gates of the ape'ture aforesaid, or by any other means, without the abatement of the said rent, until the said party of the second part or his assigns shall make amends or satisfy the said party of the first part in the particular complained of; after which the said water shall be permitted to flow as before, subject to all the limitations, reservations, and conditions herein mentioned and contained. And in case there shall be a failure, neglect, or refusal to pay as aforesaid the quarter-yearly rent, in any instance, for one-quarter of a year after the same shall have become due, then this lease may be forfeited and made void, at the option of the party of the first part, these rights in the party of the first part from the legal right of collecting the rent, or from proceeding against the party of the second part and his assigns, by suit, injunction, or otherwise.

And whereas the primary object of the Chesapeake and Ohio Canal is to afford navigation, and the means of easy transportation for produce and merchandise passing on the said canal and its branches, and at times there may not be found in the canal sufficient water to serve the purposes of the navigation of the said canal and its branches (with such depth of water as may be deemed expedient by the party of the first part to be maintained therein for the purposes of said navigation), and also to propel machinery, it is further mutually understood and agreed between the said parties that, whenever, in the opinion of the officers charged with that duty, by the said party of the first part, or the said officers may, for the time, in their or his opinion requisite, limit the quantity of water to be drawn from the said canal according to the provisions of this contract, at the point aforesaid, or altogether stop the same, without liability to answer therefor, in damages, to the said party of the second part, or his assigns: Provided, however, that the said quantity of water shall not be diminished or stopped at the point aforesaid, while water is permitted to pass at any point, dependant on the same feeder for its supply for the purpose of propelling machinery, under a water-right or contract, the commencement of the term of which is later than the aforesaid first day of July, in the year eighteen hundred and sixty-four. And in all cases of a partial or total suspension of the use of water from such cause, a pro rata deduction (in part or in full, as the case may be) shall be made from the rent for the days during which the use of the water is so suspended.

And the said party of the first part doth further covenant and agree to and with the said party of the second part and his assigns, that the said party of the first part will hereafter, if requested within twenty days after the expiration of the term aforesaid, by the said party of the second part or his assigns, renew this lease or contract for another term of twenty years, on the same terms and conditions, and subject to the same limitations, as are herein contained; and so from

49 expire, on the condition of the said party of the second part, or his assigns, paying to the said party of the first, at each renewal, a fine or bonus of one year's rent, which fine or bonus will be on the first renewal, six hundred ($600) dollars, and on each subsequent renewal, six hundred ($600) dollars; and, from and after renewal or re-letting, as aforesaid, the rent shall be at the rate of six hundred ($600) dollars per annum.

In witness whereof the Chesapeake and Ohio Canal Company have caused their seal to be affixed, and the president of the said company has signed his name; and the party of the second part hath set his hand and seal the day and year first above written. Done in duplicate.

[L. S.] L. J. BRINGLE,
President of The Chesapeake & Ohio Canal Co., ad interim.
GEORGE HILL, J'R. [SEAL.]

Signed, sealed, and delivered in presence of—

Attest:
W. S. RINGGOLD,
Clerk of Board.

Answer of the Chesapeake and Ohio Canal Company to the bill of complaint of George Hill, j'r, against them in chancery exhibited.—Filed July 30, 1866.

These respondents, saving and reserving all manner of exceptions to said bill for its manifold errors and imperfections, nevertheless now proceeding to answer the same, as far as advised that an answer from them is material, for answer say:

They admit that complainant is the proprietor of a paper mill in Georgetown, at the corner of Potomac and Water streets, propelled by water flowing from the canal of said respondents, but how much capital was invested therein they know not.

They admit that a certain lease was executed by them to complainant, dated the 21st of January, 1864, containing mutual stipulations whereby a certain privilege was granted to him of drawing water from their canal for the purpose of propelling the machinery of said paper mill, which privilege was to continue for a term of twenty years, from the first day of July, 1864, at an annual rent of $500 for the first ten years, and $600 for the succeeding ten years of said term, payable quarter-yearly.

They deny, however, that in said lease it was agreed that complainant should be at liberty to draw off from the said canal two hundred square inches of water for the purpose aforesaid. They exhibit herewith a copy of said lease, marked "Def't's Ex'b't 1," from which it appears that said complainant is expressly limited to so much water as will pass through an aperture of two hundred square inches in an iron plate, the location of which is clearly fixed by said agreement at the canal bank, and the rent of said water is fixed at $2.50 for every square inch of said aperture for the first ten years, and $3 per square inch for the second ten years, which method of leasing and which standard of charging are the same that have been in vogue with respondents for a period of twenty years; the rents upon said water leases having never been calculated upon any standard of the actual flow of water or the amount of power desired therefrom, but having been always proportioned to the

number of inches through which the water is delivered from said
50 canal, and it is therefore wholly immaterial whether said complainant received under said lease the full power of a volume of water two hundred inches square, or lost a portion of said power through friction or other causes. Respondents also call attention to the fact that by said lease the force right of ingress and egress is reserved to the officers of respondents, to and from the premises of complainant, for the purpose of examining the fixtures and works connected with the drawing off of said water from the canal, &c.; and the right is further reserved to respondents in case the complainant shall alter or enlarge the forebray or trunk or the aperture through which said water is delivered, to stop or cut off the supply entirely.

And respondents wholly deny that complainants has complied with the provisions in said articles of agreement in said lease contained, to be done and performed on his part. To the contrary thereof, they shew that the complainant violently removed the *gague* placed in his trunk or forebray, and thereby enlarged the aperture through which the water is discharged, in direct violation of said agreement, and was thereby using an unlimited quantity of water without paying for the same, to the detriment of said canal; that in consequence thereof the officers of said company were about to shut off his supply of water, as they were bound to do, when said complainant earnestly appealed to them to delay any action in the premises until the next meeting of the board of president & directors of said company, representing that his supply of water under said lease was wholly inadequate for his said mill, which request was acceded to; and that subsequently, upon representations and solicitations of complainant, said board of president & directors passed a resolution, not on the day nor in the terms stated by said complainant, but on the 10th day of May last, to the effect that the engineer & gen. sup't of the canal should ascertain as early as practicable the quantity of water required at the mill of complainant, and that if said quantity so ascertained could be permitted without detriment to the navigation of the canal, it should be granted, and a suitable *guage* to embrace the whole quantity, inclusive of the 200 inches already granted, should be placed at the proper point, and a lease should be executed for such additional quantity upon the usual terms, on payment of a bonus of $3 per inch for such additional quantity; that the engineer not having acted on the premises, the complainant meanwhile using said water without limit, said board of directors, on the 1st of June, 1866, passed another resolution that said engineer & gen'l superintendent should ascertain as soon as practicable the additional quantity of water required at the mill of complainant, and that a gauge suitable for such quantity, inclusive of the 200 inches now already under lease, be placed at the proper point, and that when such additional quantity should be ascertained, said complainant be required at once to pay the bonus of $5 per inch; otherwise that the water be reduced to the original 200 inches. A copy of said resolution is filed herewith, marked "Def't's Exh't 2."

They further shew that said engineer & gen'l sup't, in pursuance of said resolution, reported the amount of water required by said complainant to be so much as would pass through an aperture of seven hundred inches square, including the two hundred inches already granted him, of which the complainant was *only* notified, and, in fact, complainant then was, and has been ever since, *been* using more than said amount of water, receiving the same through a larger aperture than 700 inches square, and therefore it became the duty of said com-

plainant, if he desired to avail himself of said concession and
51 obtain a further lease from said respondents, forthwith to pay a bonus to respondents of $5 per inch upon 500 square inches additional to his first grant. But respondents deny that said complainant was ever ready and willing to pay said stipulated bonus, as aver'ed by him, or ever offered to pay the same, or any part thereof; on the contrary, they shew that he has always positively refused to pay the same, upon the pretext that he was not using the quantity of water charged to him; that the pretended offer in his said bill is wholly deceitful and delusive, and wholly variant from the condition of the resolution aforesaid, being merely an offer to pay for so much water as said complainant may draw off or actually use, to be estimated accordingly to some more fanciful scheme of measurement not entering into his agreement with respondents in his original lease, or contemplated by them in the resolutions aforesaid, and not being an offer to pay according to the number of square inches through which said water is delivered by respondent from their canal, which is the usual method of payment, *in* which furnishes the only uniform standard of charging, which enters into all the water leases, and was intended in the resolution, & which offer is further wholly vague and uncertain, susceptible of various interpretations, & unaccompanied with any production of money in . Respondents shew that the resolutions were not a grant or contract, but the mere private action of the respondents without consideration, and revocable at pleasure, and did not of themselves convey any title to said complainants to said additional quantity, and that said complainant, having wholly refused to comply with the condition prescribed in said resolutions, no lease or grant for said additional water was ever made to him, & he is without title to the same, and respondents are fully entitled to restrict him to his original 200 inches, and ever to cut his supply off entirely for the time being, in consequence of his violation of the terms of said lease.

And, further answering, respondents deny the averments of said bill in regard to the resolution therein mentioned, as of the 20th of February, 1865. They shew that certain proprietors of flour mills in Georgetown who had water-leases similar to complainant's, not in any manner questioning the right of respondents to locate the water-*guages* where it seemed best to them, or to charge their water-rents according to the principle *her'inbefore* stated, but finding their water inadequate for the machinery, appealed to respondents to allow them additional water and locate the *guages* nearer their machinery, in order to avoid the loss of power through friction, &c., whereupon respondents refused to increase their grants of water, but a resolution was passed by the board of directors on the 23 of February, 1865, that the superintendent of the Georgetown division, under the direction of W. C. Smith, C. E., be directed to place the *guages* for the mills at Georgetown at such points as may be deemed most advisable to effect the object of the water-grants, & to limit the flow of water to the quantity to which the lesse's are severally entitled; provided, that said lesse's shall severally assent in writing that the officers of the company may, at all times, have free access to their premises for examination or regulation of such *parts* as may be constructed upon them; and provided further, that the board may, at any time during their pleasure, if they shall deem it necessary, alter or change the position of said *guage* or *guages*, or any of them, as contemplated by the leases, &c., &c., a copy of which resolution is herewith filed, marked "Def't Exh't 3"; that said complainant's mill was not completed at that time, and he was no party to said proceeding;
52 that said resolutions were not passed at his instance & request, as stated by him, but at the request of the proprietors of the flour

mills, as aforesaid, conveyed through an attorney employed by them for that purpose, who appeared in person before the board; that complainant never became a party to said resolutions by signing, or offering ever to sign, the written consent required by them, and consequently respondents deny that said resolution became in any sense a part of their agreement with complainant, or affected the terms of his original lease aforesaid. And even had complainant become entitled to the benefit of said resolution, the right is therein reserved to respondents to alter the location of the *guage* at pleasure, and that of complainant was fixed by the officers of the company long afterwards. And respondents shew that the mills of complainant is very differently situated from the flour mills aforesaid, the latter receiving their water-power under a four-feet head, while the machinery of the complainant is situated some thirty feet below the surface of the canal, and is, therefore, under entirely different conditions for the application of the water.

Respondents admit that the complainant's mill is situated at some distance from the canal, and may well admit that his loss of power through friction is considerable, though they cannot admit his statements in regard to the quantity so lost, and the quantity delivered and used. But they wholly deny that they are bound to deliver any particular quantity at the point where it is available, viz, at his machinery, or that they are entitled to charge a rent for only so much power as is there received, after making deductions for loss of power through friction or other mechanical causes. They shew that they never agreed to, or at any time proposed, anything of this kind or its equivalent, but simply consented to deliver from their canal so much water as might be needed, at a certain bonus and annual rent, for every square inch of aperture through which the same is delivered, and that the complainant, having selected his site, & constructed his works to suit his own calculations, the defendants are not bound, and have not proposed, to adapt their canal and its business to his mill. They submit, therefore, that the averments of said bill in regard to the proper admeasurement of the quantity of water actually used by him, even if correct, which they do not admit, are wholly immaterial to this controversy.

And, further answering, respondents admit that, said complainant having wholly failed & refused to comply with the conditions of said resolutions, and having therefore acquired no title to any more water than his original lease allowed him, the agent of respondents, John Cameron, was directed to restore the *guage* provided for in said original lease, restricting the flow of water to so much as would pass through an aperture of 200 inches, which gauge, for the benefit of complainant, had been placed on his premises, at a short distance from the canal bank; and they shew that said complainant, in direct violation of the terms of his said lease, refused to permit said Cameron to enter his said premises for the object aforesaid, and in the most lawless and violent manner threatened to assassinate him if he should attempt to do so, which threat, as they are informed, has been publicly reiterated in various places; and that in consequence of this, and not before, said Cameron was directed to shut off the water entirely from the complainant's premises, which is expressly permitted by the terms of the lease aforesaid.

And they further shew that their authority to sell water for milling purposes is limited to the surplus water not needed for navigation; that there is often a scarcity of water on the level at Georgetown and barely
53 sufficient for navigation, and they are compelled to husband the same; that it is of value, and the sale of water-right is one source

of their revenues; that complainant is now using largely more than he is entitled to, without paying for it, to the detriment of respondents, and the exercise of the remedy provided therefore in the lease aforesaid is necessary for their protection.

They admit that their collector at Georgetown, supposing that complainant had come under obligations to pay for said increased amount of water, and finding him in the full use and enjoyment thereof, required him to pay the said bonus in addition to the quarterly rent aforesaid, and refused to receive the quarterly rent on the 200 inches only, and upon complainant's refusal to make said payment the said Cameron was instructed to proceed as aforesaid.

And while claiming that they are entitled to act in the premises without regard to the consequences to the business of the complainant, the respondents deny that said contemplated action would work irretrievable injury to complainant which is not susceptible of compensation in damages at common law.

And wholly denying that they have threatened or design to deprive the complainant of his water-power, otherwise than in accordance with the rights reserved to them by the agreements & proceedings aforesaid, or have demanded more water-rent than complainant is liable for as aforesaid, respondents pray hence to be dismissed with their reasonable costs, &c., without this, &c.

WALTER S. COX, *Sol'r.*

Attest:
W. S. RINGGOLD, [L. S.]
Clk of Board.

DISTRICT OF COLUMBIA,
County of Washington, sct:

On this 28th day of July, A. D. 1866, before the subscriber, personally appeared Walter S. Ringgold, clerk of said C. & O. Canal Co., & John Cameron, and make oath on the Holy Evangely of Almighty God that the matters stated in the aforegoing answer are true; the said Cameron speaking as to the averments as to him, & said W. S. Ringgold as to the other averments in the said answer.

CHARLES WALTER, *J. P.*

[5c. stamp.]

Defendant's Exhibit No. 1.—*Filed July* 30, 1866.

[A certified copy of articles of agreement between the parties to this cause, and already filed by complainant as exhibit to the original bill and marked "G. H., J'r, No. 1." See page 9 of this transcript.—CLERK.]

Defendant's Exhibit 2.—*Resolution and order of the Ches. & Ohio Canal Co.—Filed July* 30, 1866.

The following resolution was adopted by the board on the 10th of May, 1866:

Resolved, That the engineer & gen'l superintendent of the canal be directed to ascertain as early as practicable the quantity of water required at the mill of George Hill, j'r, and when ascertained, if the allowance of said quantity can be permitted without detriment to the navigation of the canal, that such additional quantity be granted, and that a suitable *guage* to embrace the whole quantity (inclusive of
54 200 inches now leased) be prepared and placed at the proper point, and that a lease be executed for such additional quantity

of water-power upon the usual terms, on payment of a bonus of $5 per inch for such additional quantity of water-power.

On the 1st day of June, 1866. the board—

Ordered, That the engineer & gen'l sup't of the canal be directed to ascertain, as soon as practicable, the additional quantity of water required at the mill of George Hill, j'r, and that a suitable *guage* for such additional quantity, inclusive of 200 inches now under lease, be placed at the proper point, and when such additional quantity be ascertained, that said Hill be required at once to pay the bonus of $5 per inch; otherwise that the water be reduced to the original 200 inches.

OFFICE CHES. & OHIO CAN. C. *C.*,
Washington, July 25, 1866.

I certify the foregoing to be true copies from the minutes of proceedings of the president & directors of the Chesapeake & Ohio Canal Company.

W. S. RINGGOLD,
Clerk & Treasurer.

Defendant's Exhibit No. 3.—*Resolution of the Ches. & O. Canal Company.*—*Filed July* 30, 1866.

At a meeting of the president & directors of the Chesapeake & Ohio Canal Company, on the 23rd of February, 1865, the following resolution was adopted:

Resolved, That the superintendent of the Georgetown division, under the direction of W. C. Smith, C. E., be directed to place the water-*guages* for the mills at Georgetown, at such points as may be deemed most advisable to effect the object of the respective water-grants, and to limit the flow of water to the quantity to which the lessees are severally entitled: Provided, That said lessees shall severally assert in writing that the officers of the company may, at all times, have free access to their premises, for examination or regulation of such parts as may be constructed upon them: And provided further, That the board may, at any time during their pleasure, if they shall deem it necessary, alter or change the position of such *guage* or *guages*, or any of them, as contemplated by the lease, and that this resolution shall not, in any other manner, change or impair the provisions or requirements of the respective leases granted to said parties.

Attest:
(Signed) W. S. RINGGOLD,
Clk & Treas.

We, the undersigned, holding water-leases from the Chesapeake & Ohio Canal Company, do hereby assent to the provisions of the aforegoing resolutions, and request that the water-*guages* be placed upon our respective premises, at or near the water-wheel.

February, 1865.
(Signed) GEO. SHOMAKER & CO.
A. ROSS RAY & BRO.
HERR & WELCH.
D. L. SHOMAKER & BRO.
W. YOUNG.
JOHN DAVIDSON.

55 OFFICE CHES. & OHIO CANAL CO.,
Washington, July 25, 1866.

I certify that the aforegoing is a true copy from the minutes of proceedings of the president & directors of the Chesapeake & Ohio Canal Company of the 23rd of February, 1865, and of a paper on file in this office.

W. S. RINGGOLD,
Clerk & Treasurer.

Order continuing cause to Sept. term, 1866.—*Filed July* 31, 1866.

GEO. HILL, J'R,
vs.
CHES. & O. CANAL CO.

AT CHAMBERS, *this* 31*st day of July*, 1866.

Ordered, That the motion for an injunction in this cause be continued to the first Tuesday of September next. Ordered, That the complainant give adequate security to the defendants to answer all damages occasioned by the delay.

ANDREW WYLIE.

Bond for injunction.—Filed Aug. 6th, 1866.

Know all men by these presents that we, George Hill, j'r, and John Berry, are held and firmly bound unto the Chesapeake & Ohio Canal Company in the sum of three thousand dollars, current money, which sum is to be paid to said Chesapeake and Ohio Canal Company, their certain agent or attorney; to *the* which payment we bind ourselves, jointly and severally, our and each of our heirs, by these presents, sealed with our seals and dated this 31st day of July, A. D. 1866.

Whereas in a certain cause depending in equity in the supreme court of the District of Columbia, an order was passed at chambers by Hon. Andrew Wylie, justice, on the said 31st day of July, A. D. 1866, ordering that the motion for an injunction in said cause (wherein the said George Hill, j'r, is complainant, and the said Chesapeake & Ohio Canal Company the defendant) be continued until the first Tuesday of September, A. D. 1866, provided the complainant furnish adequate security to answer all costs and damages which the defendants may incur by reason of the delay occasioned by such continuance.

Now the condition of this obligation is such that, if the said George Hill, j'r, doth and shall well and truly pay and satisfy to said defendants all costs and damages suffered by them, by reason of the premises aforesaid, then the above obligation shall be null, void, and of no effect; otherwise shall be and remain in full force and virtue in law.

GEORGE HILL, J'R. [SEAL.]
JOHN BERRY. [SEAL.]

Signed, sealed, & delivered in presence of—
GEO. W. BEALL.

Complainant's petition for rule, &c.—Filed Aug. 20, 1866.

To the honorable the justices of the supreme court of the District of Columbia, sitting in equity:

56 Your petitioner, George Hill, j'r, respectfully sheweth unto your honors: That on or about the day of July, 1866, your petitioner filed in this honorable court his certain bill in equity,

praying the issuance of the special writ of injunction against The Chesapeake & Ohio Canal Company, enjoining & restraining the said Chesapeake & Ohio Canal Company from cutting off or diminishing the supply of water flowing from their canal to petitioner's mill & factory at Georgetown, in the District of Columbia. That thereupon, to wit, on the said day of July, 1866, the said Chesapeake & Ohio Canal Company, having previously received notice of your petitioner's intention to file his said bill, voluntarily appeared at chambers, before his honor Andrew Wylie, associate justice, by their solicitor, Walter S. Cox, esquire, & filed their answer to your petitioner's said bill, and thereupon consideration of the motion for injunction was had by his honor Justice Wylie, & upon the suggestion that the board of directors of the said Chesapeake & Ohio Canal Company would hold session during the present month of August, at which it was expected the matters in controversy between your petitioner & the said company would be amicably adjusted, his honor *defended* the final disposition of the said motion for injunction, & passed an order, which order was drawn up & prepared by the aforesaid solicitor for said company and in his handwriting, continuing said motion until the first Tuesday of September, 1866, provided your petitioner should give bond, with adequate security, to answer any costs or damages which may accrue or be occasioned by reason of the delay.

Your petitioner further sheweth to your honors that he, on his part, hath fully complied with this said order by giving the required security, all of which will fully appear by reference to the record proceedings in said cause, which your petitioner prays he may have leave to produce & read as part hereof.

Your petitioner further sheweth that, on or about the 16th day of August, your petitioner learned that it was the intention of the said company to cut off or diminish the supply of water flowing to your petitioner's mill, & thereupon, & in order that the said company could be in error as to the purport of the aforesaid order & the present attitude of the cause, procured a certified copy of said order & the certificate of the clerk of the court, certifying that your petitioner had complied with the said order by giving the security required thereby, & caused the same, on the 17th day of August, 1866, to be delivered to William S. Ringgold, the clerk and treasurer of said company, & charged with the superintendence of the company's canal & affairs in the District of Columbia.

But your petitioner respectfully sheweth that, notwithstanding the premises, the said William S. Ringgold, acting as the officer & agent of said company, hath ordered one John Cameron, another agent & officer of said company, to change & reduce the supply of water flowing to your petitioner's said mill; and the said John Cameron, in execution of said order of said Ringgold, did, on the 18th day of August, 1866, while your petitioner was absent from his said mill, change & reduce the supply of water aforesaid by placing at the canal trunk a *guage* whereby the supply of water to your petitioner's mill is reduced below the quantity which your petitioner is entitled to have of said company under and by existing agreement between your petitioner & said company, which acts & doings, on the part of the above-named officers of said company, your petitioner insists are a palpable violation of the intent & meaning & the order prepared by their own solicitor & approved of by his honor Justice Wylie as aforesaid; & your petitioner avers
57 that the said agents, in thus acting in the premises, have been guilty of & now are in contempt of the lawful authority of this honorable court.

Your petitioner therefore prays that a rule may be lain on this said William S. Ringgold & John Cameron, commanding them by a certain day & upon certain pain to appear before your honors to shew cause, if any they have, why an attachment should not issue against them for contempt of the lawful authority of this court.

Am as in duty, &c.,

GEORGE HILL, J'R.

JONES & ASHFORD,
Sol'rs for Comp't.

DISTRICT OF COLUMBIA,
County of Washington:

On this 20th day of August, A. D. 1866, before the subscriber, a justice of the peace in and for the county and district aforesaid, personally appeared George Hill, j'r, & under oath in due form of law, that matters & things stated in the foregoing petition are true, to the best of his knowledge & belief.

[SEAL.]

N. H. MILLER,
J. Peace.

Order to issue rule.—Filed Aug. 20, 1870.

The motion is granted, and rule directed to be entered as prayed, returnable before me at chambers on 21st instant, at 12 o'clock m.

ANDREW WYLIE.

Rule to show cause.—Issued Aug. 20, 1866.

In the supreme court of the District of Columbia, Aug. 20, 1866.

GEORGE HILL, J'R,
vs.
CHESAPEAKE & OHIO CANAL CO. } 739. Equity docket, 8.

For reasons set forth in a petition filed this day in said by the complainant, you are hereby commanded to appear in said court on the 21st inst., at 12 o'clock m., and show cause, if any you have, why an attachment for contempt of the authority of this court should not issue against you.

By order of the court.

Test:

[L. S.]

R. J. MEIGS,
Clerk, &c.

Marshal's return on rule.—Returned Aug. 21, 1866.

Served Aug. 21, '66.

DAVID S. GOODING,
U. S. Marshal,
Per JA'S R. O'BEIRNE,
U. S. Dep. Mar. D. C.

AUG. 21, '66.

Order discharging rule.—Filed Aug. 21, 1866.

58 Ordered, at chambers, this 21st day of August, 1866, that the rule on certain officers and agents of defendant, to show cause why an attachment for contempt should not be issued against them, granted on the 20th inst., be, and the same is hereby, discharged.

ANDREW WYLIE, *Justice.*

Amended bill.—Filed Sept. 18, 1866.

In the supreme court of the District of Columbia.

GEORGE HILL, J'R,
vs.
CHES. & OHIO CANAL COMPANY. } No. 739. Equity doc., 8.

To the honorable the justices of the supreme court of the District of Columbia:

The amended bill of complaint of George Hill, complainant, against said defendants, exhibited by leave of court in that behalf first had & obtained, respectfully sheweth:

That the provision of the aforesaid resolution of the board of directors of said canal company of May, 1866, were by the company required to be accepted by complainant in writing, and were accepted in writing by complainant, and the written acceptance thereof, as complainant is informed, was, by W. D. Davidge, complainant's solicitor, delivered to Ringold, treasurer & secretary of said defendants, and complainant requires of the defendants the production here in court of said written acceptance, in connection with his answer hereto.

Your orator further sheweth and avers that said resolutions of May, 1866, as accepted by complainant, was intended & operated as an enlargement of the original contract & lease between defendants & your orator, of date January, 186 , in respect to the quantity of water to be furnished by defendants, and to be used & enjoyed by your orator, in that it provides for an additional quantity of water, to be measured in the mode prescribed in said original contract.

Yet, notwithstanding it was the purpose & object of said resolution, as the same was accepted & acted upon by your orator, to enlarge the said contract in respect to the quantity of water to be used & enjoyed by your orator, to be measured according to the terms of said contract, said defendants are seeking to charge your orator, for such additional quantity of water as he had used under the provisions of said resolutions, by a rate & measurement never contemplated in said original contract; but defendants, by enlargeing the aperture at the canal bank, at the upper or top line thereof, without enlargeing, in a cor'esponding degree, the width or length thereof, as was done & practised by the defendants' engineer in ascertaining the quantity with which they seek to charge your orator, said defendants diminish the pressure of the water at the aperture, & thereby proportionately diminish the amount of power received by your orator.

Your orator further shews & charges that, in entering into & making the original contract between the defendants & your orator, the chief & only object & intention of the parties thereto was to furnish & acquire the motive power necessary to the operating of complainant's mill, & such being the object of said contract, & the intention of the parties thereto, your orator submits that a just and equitable construction & int*e*rpretation of said contract would require that defendants, in ascertaining the measurement of the water with which they seek to
59 charge your orator, should have enlarged the aperture *aperture* at the canal bank in greater proportion in the length thereof than in the hig'th thereof. And your orator avers & charges that, if such a mode of measurement had been adopted & practised by defendants' engineer in ascertaining the quantity of water with which your orator should be charged, all which could have been done & could be done without detriment to the navigation of said canal, & without injury to de-

Your petitioner therefore prays that a rule may be lain on this said William S. Ringgold & John Cameron, commanding them by a certain day & upon certain pain to appear before your honors to shew cause, if any they have, why an attachment should not issue against them for contempt of the lawful authority of this court.

Am as in duty, &c.,

GEORGE HILL, J'R.

JONES & ASHFORD,
Sol'rs for Comp't.

DISTRICT OF COLUMBIA,
County of Washington:

On this 20th day of August, A. D. 1866, before the subscriber, a justice of the peace in and for the county and district aforesaid, personally appeared George Hill, j'r, & under oath in due form of law, that matters & things stated in the foregoing petition are true, to the best of his knowledge & belief.

[SEAL.]

N. H. MILLER,
J. Peace.

Order to issue rule.—Filed Aug. 20, 1870.

The motion is granted, and rule directed to be entered as prayed, returnable before me at chambers on 21st instant, at 12 o'clock m.

ANDREW WYLIE.

Rule to show cause.—Issued Aug. 20, 1866.

In the supreme court of the District of Columbia, Aug. 20, 1866.

GEORGE HILL, J'R,
vs.
CHESAPEAKE & OHIO CANAL CO. } 739. Equity docket, 8.

For reasons set forth in a petition filed this day in said by the complainant, you are hereby commanded to appear in said court on the 21st inst., at 12 o'clock m., and show cause, if any you have, why an attachment for contempt of the authority of this court should not issue against you.

By order of the court.

Test:

[L. S.]

R. J. MEIGS,
Clerk, &c.

Marshal's return on rule.—Returned Aug. 21, 1866.

Served Aug. 21, '66.

DAVID S. GOODING,
U. S. Marshal,
Per JA'S R. O'BEIRNE,
U. S. Dep. Mar. D. C.

AUG. 21, '66.

Order discharging rule.—Filed Aug. 21, 1866.

Ordered, at chambers, this 21st day of August, 1866, that the
58 rule on certain officers and agents of defendant, to show cause why an attachment for contempt should not be issued against them, granted on the 20th inst., be, and the same is hereby, discharged.

ANDREW WYLIE, *Justice.*

Amended bill.—Filed Sept. 18, 1866.

In the supreme court of the District of Columbia.

GEORGE HILL, J'R,
vs.
CHES. & OHIO CANAL COMPANY. } No. 739. Equity doc., 8.

To the honorable the justices of the supreme court of the District of Columbia:

The amended bill of complaint of George Hill, complainant, against said defendants, exhibited by leave of court in that behalf first had & obtained, respectfully sheweth:

That the provision of the aforesaid resolution of the board of directors of said canal company of May, 1866, were by the company required to be accepted by complainant in writing, and were accepted in writing by complainant, and the written acceptance thereof, as complainant is informed, was, by W. D. Davidge, complainant's solicitor, delivered to Ringold, treasurer & secretary of said defendants, and complainant requires of the defendants the production here in court of said written acceptance, in connection with his answer hereto.

Your orator further sheweth and avers that said resolutions of May, 1866, as accepted by complainant, was intended & operated as an enlargement of the original contract & lease between defendants & your orator, of date January, 186 , in respect to the quantity of water to be furnished by defendants, and to be used & enjoyed by your orator, in that it provides for an additional quantity of water, to be measured in the mode prescribed in said original contract.

Yet, notwithstanding it was the purpose & object of said resolution, as the same was accepted & acted upon by your orator, to enlarge the said contract in respect to the quantity of water to be used & enjoyed by your orator, to be measured according to the terms of said contract, said defendants are seeking to charge your orator, for such additional quantity of water as he had used under the provisions of said resolutions, by a rate & measurement never contemplated in said original contract; but defendants, by enlargeing the aperture at the canal bank, at the upper or top line thereof, without enlargeing, in a cor'esponding degree, the width or length thereof, as was done & practised by the defendants' engineer in ascertaining the quantity with which they seek to charge your orator, said defendants diminish the pressure of the water at the aperture, & thereby proportionately diminish the amount of power received by your orator.

Your orator further shews & charges that, in entering into & making the original contract between the defendants & your orator, the chief & only object & intention of the parties thereto was to furnish & acquire the motive power necessary to the operating of complainant's mill, & such being the object of said contract, & the intention of the parties thereto, your orator submits that a just and equitable construction & int*e*rpretation of said contract would require that defendants, in ascertaining the measurement of the water with which they seek to
59 charge your orator, should have enlarged the aperture *aperture* at the canal bank in greater proportion in the length thereof than in the hig'th thereof. And your orator avers & charges that, if such a mode of measurement had been adopted & practised by defendants' engineer in ascertaining the quantity of water with which your orator should be charged, all which could have been done & could be done without detriment to the navigation of said canal, & without injury to de-

fendants, your orator could not be justly charg'able with anything like the quantity of water with which defendants seek to charge him.

Your orator further says & states to the court that he has always been ready & willing & now here tenders himself ready & willing to pay to the defendants the rent & bonus upon so much water as your orator has used, if measured according to the intent & spirit of the aforesaid contract as extended & enlarged upon by said resolution of May, 1866, accepted and acted upon by your orator aforesaid, and has always been ready & is now willing & ready to execute on his part a lease for the same, & if in judgment of this honorable court the measurement of said water made by the engineer as aforesaid & insisted on by defendants be conclusive upon your orator, he prays that upon payment by him to said defendants of the same & amount insisted on & claimed by them, & upon executing on his part a lease as required by said resolution, said defendants may be enjoined as prayed in your orator's bill of complaint.

And as in duty, &c., &c.

GEORGE HILL. J'R.

DAVIDGE, & JONES & ASHFORD,
For Comp't.

DISTRICT OF COLUMBIA,
County of Washington, ss :

This 18th of September, 1866, came George Hill, j'r, & made oath in due form of law that the matter' stated in the foregoing bill are true to the best of his knowledge & belief.

Subscribed & sworn to before—

N. H. MILLER, *J. P.*

Defendant's answer to am'd bill.—Filed Sept. 18, 1866.

Answer of the Chesapeake and Ohio Canal Company to the amended bill of complaint of George Hill, j'r.

These respondents, saving, &c., for answer to amended bill, say—

That the said resolution of May, 1866, contemplated further action, as appears by its terms, before any contract or grant should be entered into with the complainant, and was not intended as a proposal to be accepted by said complainant, nor was there any direction or order given by the board of directors of the said company to communicate the same to complainant, or require his acceptance thereof; but respondents admit that the officers of said company, apprehending that some further pretext might be resorted to by complainant for his unaurtherised proceedings, and that the time & trouble of carrying said resolution into effect might be wasted, did, on their own responsibility, require said Hill to accept and agree to the terms of said resolution, in writing, in order that there might be no room for controversy thereafter, and accordingly the complainant, by his counsel, did present at the office of said respondents a paper, of which a copy is herewith exhibited, marked "Defendant's Exhibit 4."

60 "*Deft's Exhibit* 4."

WASHINGTON, *May* 21, 1866.

I hereby agree to take as pay for the additional quantity of water re-

quisite for my mill according to the terms and conditions of the resolution of the board of the Chesapeake Ohio Canal Co., passed on 10 instant.

(Signed) GEORGE HILL, J'R.

I certify the above to be a true copy of a paper on file in the office of the Ches. & Ohio Canal Co.

W. S. RINGGOLD,
Cl'k & T'r.

Respondents wholly deny that said proceedings amounted, in law, to a contract, binding them to make an additional grant of water; but, supposing such to be the legal effect thereof, they further shew and submit that such contract was conditioned on the payment of a bonus, as required in said resolution, and that complainant wholly refused to comply with said condition, and thereupon the respondents became entitled either to enforce said contract or wholly to rescind the same at their election; that, in fact, before any proceedings were had or steps taken to carry said resolution into effect, said respondents elected in advance to rescind any such supposed agreement, in case of complainant's failure to comply with the condition aforesaid by their resolution of June 1st last, which directed, in such contingency, that complainant be restricted to the quantity of water given by his original lease; and as a further and more solemn rescission of any such supposed agreement, said board of directors, on the 9th of August last, passed certain other resolutions, a copy whereof is filed herewith, marked, "D'f't's Exh't 5."

"*Defendant's Exhibit 5.*"

At a meeting of the president and directors of the Chesapeake & Ohio Canal Co., held August 9th, 1866, the following proceedings were had:

Whereas George Hill, j'r, haveing refused to comply with the terms of the resolutions of the board of the 10th of May and 1*th* of June last, granting him additional water-power at his mill in Georgetown, and having otherwise acted in a violent & arbitrary manner: Resolved, That the resolutions heretofore passed by this board, in favor of George Hill, j'r, on the 10th of May and 1*th* of June respectively, be, and they are hereby, repealed, and that the board decline to grant to said Hill any water-power additional to that granted by his lease of January, 21*th* 1864, and that the superintendent be, and he is hereby, directed to restore the gauge of *of* two hundred inches, and should he be prevented from doing so, to cut off the supply of water entirely from the mill of said Hill.

Attest:

W. S. RINGGOLD,
Cl'k & Treas.

[5-c't stamp.]

Wherefore respondents claim that complainant is not entitled in law or equity to any quantity of water beyond that conveyed by his first lease.

61 Respondents further show that when complainant's want of additional water was first made known to them, it was not im-

agined that more than one or two hundred additional inches would be required, or the application would not have been entertained; that the quantity actually found to be necessary cannot conveniently be spared from the canal, and they are constrained by the increasing exigencies of navigation to refuse any additional grant of water to which they are not committed by a complete and binding contract.

And, further answering, respondents shew that complainant made application for an additional quantity of water. He did not ask to have the same delivered through any other forebay than the one constructed by him, or to have his said forebay enlarged, either of which would have been impos'ible without great expense to complainant; that at the time of his said application, complainant was, in fact, using said increased supply of water through the same forebay, and his application was, in effect, to be allowed to continue so to use it; that he could acquire no such right except in the terms and on the conditions prescribed by respondents; that their consent was given with reference to existing circumstances, and the spirit and meaning of the application; that there consent therefore, and any contract resulting therefrom, was for the delivery of additional water through said forebay; that said water was to be granted on the usual terms; that is, at the same rate of renting prescribed in complainant's former lease, which rate was established with reference to the number of square inches through which the water is delivered.

And they further shew that such being the contract, if any, there was no other method of enlarging the original aperture through which said water should be delivered, which was already of the entire width of said forebay, than to enlarge it upwards, the said complainant having constructed his forebay of such solid materials that it could not be altered & laterally enlarged without great expense to him, and perhaps without changing the machinery of his mill to which it was adapted; that complainant himself had so enlarged the aperture upwards, and was using the water through the same so enlarged at the time of the application; that his foreman was present assisting the engineer of respondents in the experiment of ascertaining the requisite quantity to be delivered by such enlargement of the aperture, and complainant therefore fully understood, when he assented to said resolution, that it contemplated no other mode of delivering the water than that actually practised and of which he has availed himself without objection. They submit therefore that the contract, if any, was to pay at the rate and in the manner claimed by respondents, and was not a contract to charge for a less number of inches than is actually used, which in a different shape would give an equivalent power; that no such contract was ever entered into by respondents with any person, and consequently could not have been contemplated by a reference to the usual terms of leasing in said resolution.

They submit that the obligations of complainant, under the alleged contract aforesaid, are in no wise affected by the form in which the flow of water is received by him; that no lease could be made which would not be open to the same objection now made, and that the complainant receiving and using the water through an aperture of his own construction, upon terms well defined and understood, no question about equivalent powers is at all relevant or can be introduced into the contract without an utter perversion of the terms and spirit thereof.

62 Respondents wholly deny that the said alleged contract, as averred in said amended bill, would require respondents in making the measurement aforesaid, to enlarge the aperture in greater propor-

tion in the length than in the height thereof. They shew that said aperture was the entrance to complainant' forebay, constructed and owned by him, over which respondents had no control, which they had no right to enlarge, & which complainant neither offered nor asked to have enlarged; that had he desired to enlarge the same, a wholly different question would have arisen, and possibly a different understanding might have been had; but they wholly deny that while said complainant has been receiving said water under one contract, and in a form chosen by himself, he is only chargeable under a contract which he might have made under other circumstances more advantageous than the alleged subsisting one.

Respondent cannot admit that said latteral enlargement would not be detrimental to their canal.

And reiterating their denial that complainant was ever ready and willing, or offered to pay according to the terms and meaning of the resolution aforesaid, respondent prays to be hence dismissed, &c., without this, &c.

WALTER S. COX, *Sol'r.*

Attest: W. S. RINGGOLD,
Clk & Treas.

On this 18th day of Sept'r, A. D. 1866, before the subscriber, personally appears W. S. Ringgold and makes oath on the Holy Evangely, &c., that the matters stated in the aforegoing answer are true, to the best of his knowledge and belief.

CHA'S WALTER, *J. P.*

Order granting injunction on payment, &c.—Filed Sept. 19, 1866.

The motion for a special injunction in this cause having been argued by counsel, and consideration being had, it is this 19th day of September, A. D. 1866, by the court ordered that the special injunction issue as prayed—provided the complainant shall, on or before Monday the 24th instant, pay into the court the amount of rent and bonus claimed by defendants as appears by the record of proceedings, to wit, the sum of two thousand eight hundred & sixteen $\frac{67}{100}$ dollars to abide the further order of the court in the premises.

GEORGE P. FISHER,
Jus. S. C. D. C.

Injunction.—Issued Sept. 27, 1866.

The President of the United States, *gr.*, to the defendant greeting:

For causes and reasons set forth and shown in the bill filed in this cause, you are hereby enjoined and strictly prohibited and restrained from molesting, interrupting, or diminishing the supply of water to your orator's paper mill in Georgetown. Hereof fail not under pain of attachment and such other process of contempt as may be issued by the court against you.

D. K. CARTTER,
Chief Justice, &c.
R. J. MEIGS, *Clerk.*

63 *Marshal's return.—Sept.* 27, 1866.

Served copy of the within injunction on Ringgold, clerk to the company.

D. S. GOODING, *Marshal.*

SEPT. 27, 1866.
REC. 313—3

Replication.—Filed Oct. 9, 1870.

GEORGE HILL, J'R,
vs.
CHES. & OHIO CANAL CO. } No. 739.—Equity.

The complainant hereby joins issue with the defendants & will hear the cause upon bill, answer, & exhibits, & such evidence as may be adduced in the cause.

JONES & ASHFORD,
For Compl't.

DEFENDANT'S TESTIMONY.

Deposition of Charles P. Manning.—Filed Feb'y, 1837.

To interrogatory 1st. My name is Charles P. Manning; my age is 49 years; and occupation that of civil engineer.

To interrogatory 2nd. I was in the employ of said company as engineer and general superintendent from January 1st, 1866, to October 1st, 1866.

To interrogatory 3rd. I know of such controversy.

To interrogatory 4th. I did take steps to ascertain the number of square inches of water delivered at the canal bank, that were required for the full operation of the paper-mill of the said Hill, in the summer of 1866, and it required at that point seven hundred square inches. This result was obtained by causing the head-gate, which occupied the full width of the complainant's forebay at the canal bank, to be carefully raised, so as gradually to enlarge the aperture for admitting water from a size declared by the complainant to be wholly insufficient for his purposes up to the dimensions required by him (or his agent and foreman, then in charge of the mill), as sufficient only for the complete working of all his machinery.

To the second 4th interrogatory. I do not know through what size of aperture the complainant's said mill is now supplied; but I know, from personal inspection and accurate measurement, that during the experiment which I caused to be made, and which resulted as before given in my response to previous interrogatory number four, that the aperture through which the mill was then supplied was of the full width practically admissible within the limits of the stone culvert built by said complainant as a forebay to his mill; and that the dimensions of the aperture demanded for the uses of said mill by the foreman thereof were 42 inches in width by 17½ inches in height; equal in area to 735 square inches.

To interrogatory 6th. At the time referred to, that is to say, in the summer of 1866, the peculiar and striking difference then existing between the mill of said complainant and the flour mills in Georgetown, supplied with water-power from the waters of the Chesapeake and Ohio
64 Canal, consisted in the use of "turbine" wheels in the former, and ordinary overshot wheels in the latter; which difference in the wheels of said mills made it necessary that the guage of the former should be located at the canal bank.

To interrogatory 7th. I do not now call to mind anything of special interest to the parties at issue in the cause, beyond my knowledge of the facts that, during several months of the spring and summer of 1866, the said complainant had an ungauged and unrestricted supply of water

from the trough of the Chesapeake and Ohio Canal for the most complete and thorough operation of the machinery of his said paper-mill in Georgetown. And that the full dimensions of the aperture in the "bulk-head" of the "forebay" when the supply of water to the mill was turned on or off, at the pleasure of the complainant or his foreman, were 42 (forty-two) inches wide, by 24 inches high; with the bottom of said aperture at an elevation of only 20 inches above the bottom of the canal, instead of 24 inches above it as prescribed by the terms of his lease.

CHA. P. MANNING.

In the supreme court of the District of Columbia.

Order for payp't of quarterly instalments.—Filed Feb'y 16, 1870.

GEO. HILL, J'R,
vs.
THE CHES. & OHIO CANAL CO. } 739. Equity.

It is further ordered in this cause, by consent of counsel, the 16th day of February, A. D. 1867, that the complainant do pay unto court, on or before the 20th inst., the quarterly instalments of water rent accrued and fallen due to defendants, according to their claims & pretensions as set forth in the pleadings on the first days of October and January last, amounting to the sum of eight hundred and seventy-five dollars, and that in default thereof the injunction heretofore issued in this cause be dissolved.

It is further ordered that, until the further order of this court in the premises, the complainants do continue to pay unto court said quarterly instalments, and that on his failure at any time so to do, said injunction shall be dissolved.

A. B. OLIN.

COMPLAINANT'S TESTIMONY.

Deposition of J. E. Stevenson.—Filed June 4, 1867.

I reside in the city of New York; and age, 44 years; I am, by occupation, a hydraulic and mechanical engineer; I am constantly engaged in the practice of my profession; I know George Hill, j'r, the complainant in this suit. I have recently examined George Hill's paper-mill, Georgetown, and particularly the machinery connected with it; and also the aperture, forebay, or floom leading from Chesapeake and Ohio Canal to said mill. Two hundred inches of water under a four-feet head, as is ordinarily understood by mill'rights and men that want to build, would afford sufficient power under a thirty-feet head, to run M'r Hill's mills with this machinery. I do not consider the manner in which the water is now measured, seven hundred square inches, is a proper or
65 fair manner of measuring the water. In this case M'r Hill is charged, paying for seven hundred square inches of water; he pays for more than double the quantity that is required to run his mill. In the Eastern States, I do not know any case in which the water is measured through a *guage*, as this company measures in this present case. There is a loss in this case, measuring in the manner in which this company measures, thirty-eight one-hundredths of the whole, as generally understood.

Cross-examined:

In answer to 1st cross-interrogatory, he saith: The difference is, I should estimate or measure by the cubic feet either in the floom above or tail race below.

In answer to the 2nd cross-interrogatary, he saith: Patterson is the only place that I know of that measures water in the same manner as this company. They have compromised the matter with some of the mills that require it, and measure by the cubic feet.

In answer to the 3rd interrogatory, he saith: I do not. He is drawing it under a five-inch head from the surface when it ought to measure four feet from the centre of the opening to the surface in the canal.

Redirect by M'r Ashford:

The Dundee Manufacturing Co., at Passaic, New Jersey, rent their water under a three-feet head by the square feet, drawn through a similar *guage*, as the one used by the Chesapeake and Ohio Canal Co., but they state in their leases the number of cubic feet of water that *guage* will supply. The distance of the canal from M'r Hill's mill is between 350 & 400 feet. Putting a *guage* in at the canal the seize of 200 square inches, would destroy the effect or fo'ce of the motive power, and it would be impossible to run his mill with the amount of water that he would get through that *guage*. There is some difference in favor of placing the *guage* near the wheel.

(A paper is herewith filed and marked "Exhibit G. H., No. 1," which shows the result of the calculations.)

J. E. STEVENSON.

Exhibit G. H., No. 1, *to deposition of J. E. Stevenson.—Filed June* 4, 1867.

GEORGETOWN, D. C., *May 10th*, 1867.

Calculations of the discharge of water from two turbine wheels in the paper-mill of M'r Geo. Hill, in Georgetown, D. C.

Head of water, 30 feet.

Measurement of all the discharge openings of 30-inch turbine is 86 sq'r. inches.

Actual discharge, when running full power, is 68.82 sq'r. inches, equal to 20.95 cubic feet per second, or 57.15 horse-power.

Measurement of all the discharge openings of 14-inch turbine is 17.20 sq'r. inches.

Actual discharge, when running full power, is 13.76 sq'r. inches, equal to 4.19 cubic feet per second, or 11.43 horse-power; total for both wheels, 25.14 cubic feet per second, or 68.58 horse-power.

200 square inches of water, drawn theoretically under a 4-feet head, will be equal to 73.04 sq'r. inches under a 30-feet head. Thus, $\frac{200 \times 16}{43.81}$ =73.04 sq'r. in.=60.66 horse-power.

66 The coefficient of discharge by a rectangular *guage* (as through a thin plate under a 4-feet) head is 62 per cent., consequently

$200 \times \frac{62 \times 16}{43.81} = 45.28$ sq'r. in.=37.60 horse-power; 70 sq'r. inches of water, drawn theoretically under a four-feet head, is equal to 255.64 sq'r. inches under a 30-feet head; and, using the coefficient .62, applicable to a *guage* under a 4-feet head, as before, reduces the amount to 158.49

sq'r. inches under a 30-feet head, or double the amount of water necessary to run the mill.

Thus, $\frac{700 \times 16 \times 62}{43.81} = 158.50$ sq'r. inches.

DEFENDANT'S TESTIMONY.

Deposition of Walter S. Ringgold.

I am clerk and treasurer of the Chesapeake & Ohio Canal Company, and have held the office for 20 years last December, and I am the executive officer.

Looks at defendant's exhibit, marked "No. 1," and says: "That is the usual form of leasing in Georgetown, D. C., by that company; to my knowledge there has never been any other form of leasing. The company have never leased water by the cubic foot or charged rents according to the number of cubic feet or the quantity of water delivered, however measured, or otherwise than according to the size of the aperture through which the water is delivered from the canal. There are two classes of leases. The first class amount to eleven hundred & seventy-five inches, which has existed more than 20 years, and the present rate on those leases is three dollars per inch per annum. In April, 1855, the board determined to lease an additional quantity of twelve hundred inches on payment of a bonus of five dollars per inch, and an annual rent, for the first ten years, of $2.50 per inch per annum; and for the second ten years $3.00 per inch per annum, with privilege of the renewal of 20 years on payment of one year's rent, at three dollars per inch as a bonus, and the rent to continue at the rate of three dollars per inch per annum. On these terms all leases have been made since 1855. By the number of inches is meant the number of inches of the aperture.

The quantity of water leased to the millers of Georgetown are as follows:

A. H. Herr	300	inches	$3 00
J. S. Welch	500	"	3 00
J. Davidson	50	"	3
G. Shoemaker & Co	125	"	3
A. R. Ray	100	"	3
D. L. Shoemaker	100	"	3
J. Davidson	200	"	2½
G. Waters	200	"	"
P. R. Ray	400	"	"
D. L. Shoemaker	200	"	"
Gallant & Cassel	50	"	"
Abner & Brady	150	"	"

W. S. RINGGOLD.

67 *Order.—Clerk S. C. D. C. to pay def'ts, &c.—Filed July* 13, 1867.

It is this 13th day of July, A. D. 1867, ordered that the clerk pay to the defendant, out of the fund deposited by the complainant, the sum of one thousand dollars.

By order of the court.

Receipt to clerk for payment, &c.—Filed July 13, 1867.

Received one thousand dollars, in obedience to above order.

W. S. COX,
Sol'r for Def't.

Order appointing special commissioner, &c.—Filed Aug. 1, 1867.

In this cause it is this 1st day of August, A. D. 1867, ordered that W. R. Hutton be, and he is hereby, appointed a special commissioner to inquire and make report to this court upon the following questions, viz:

1. What volume of water is ordinarily received into the forebay of complainant's mill, when the same is in operation, from the Ches. & Ohio Canal, and through how many square inches of aperture.

2. What quantity of water is discharged from said mill in any given time, through its tail-race, and especially in comparison with other mills at Georgetown.

3. How many square inches of aperture, situated at the distance of two feet from the bottom of the canal, and of the width of complainant's forebay, would furnish a flow of water equivalent in power and effect to the additional water received by the complainant, under the resolutions of May and June, 1866, exhibited in this cause, over and above his original grant.

4. Upon any other matter calculated, in his judgment, to throw li ght upon the subject of this controversy.

It is further ordered that either party have leave to take further testimony before October special term next of this court.

By order of this court.

Report of Special Commissioner Hutton.—Filed Oct. 1, 1867.

Answers to the questions proposed in the order.

To question 1. Twenty-three (23) cubic feet of water per second, through an aperture of 1,008 square inches, the gate being entirely removed.

To question 2. Twenty-three cubic feet per second, besides a small quantity received from the Potomac Water Works, which could not be measured. The other mills discharge through their tail-races about 6⅔ cubic feet per second for each one hundred inches of aperture, varying somewhat with the circumstances of each mill.

To question 3. The question is indeterminate. It is first necessary to ascertain how much water was originally granted, and this is a matter of interpretation of the contract, and to be decided by the court.

1st. Either the complainant is entitled to as much water as will pass through the aperture, formed and situated as described, under any circumstances, or—

68 2nd. To only so much as will pass through it under the conditions of this particular case. Answers are given on both suppositions.

When water flows through an opening and discharges freely in the air, a greater quantity passes than when it is impeded by a greater or less height of back water.

Overshot-wheels, as are most of those in the Georgetown mills, re

quire the water to come on them with a free fall, and therefore when the guage is placed at the wheels the miller has the benefit of the whole head and fall from the canal to the river, and the canal loses no more water than it agrees to furnish. In the complainant's mill turbines are used, placed 30 feet lower canal surface, and arranged to do their work under that head. Any diminution of head causes a loss of velocity and of power.

It is not possible while his works are arranged as at present, for complainant to receive through any given aperture as much water as is received by an overshot wheel through the same.

1st. If he is entitled to as much water as would be received at the other mills in Georgetown through the same aperture. The quantity authorized by resolutions of May & June referred to, is 9 cubic feet per second, which will require an aperture, as described in the 3d interrogatory, of one hundred & thirty-five square inches. But the whole quantity of 23 cubic feet will require an opening of 345 sq. inches.

2nd. In case he is entitled to draw only so much as will pass through an aperture of 200 square inches in the particular circumstances of his mill, then an aperture of 200 square inches will supply eleven cubic feet at a very much diminished head, and the additional quantity or 12 cubic feet, will require an opening of 217 square inches; but, owing to the narrowness of the forebay and the necessity to keep up the head, the whole quantity required cannot be obtained through an opening less than about 700 square inches without loss of power and effect.

4th. As information that may be useful, the whole quantity of water taken from the canal to run complainant's mill, at its ordinary capacity, is equal to 345 square inches of aperture, as measured on the overshot-wheel, if said aperture is made the full width of the complainant's forebay, and 352 inches if made the width of the present gate in his forebay.

NOTE.—In consequence of difficulty of access and the absence of conditions to a correct measurement of the water flowing in the tail-races, it was obtained from the quantity flowing into them from the wheel, a method easier of determination and more accurate in its results.

WM R. HUTTON,
Commissioner.

Order certifying cause to court in banc.—Filed Oct. 10, 1867.

GEO. HILL
vs.
CHES. & OHIO CANAL CO. } 739. Eq. do. 8.

On motion, &c., with consent of counsel on both sides, it is, this tenth day of October, A. D. 1867, ordered that this cause be certified to this court in gen'l term.

By order of the court.

69 In the supreme court of the Dist. of Columbia, sitting in general term.

Final decree.—Filed Jan'y 28, 1868.

GEORGE HILL
vs.
THE CHES. & OHIO CANAL CO. } No. 739. Eq. doc. 8.

This cause coming on to be finally heard, and having been heard and

submitted, it is, by the court, this 28th day of January, A. D. 1868, ordered, adjudged, and decreed, that the injunction heretofore issued in this cause be, and the same is hereby, made perpetual for the period of complainant's lease, as to so much of the water drawn from the canal of defendants by the complainant, as will pass through an aperture of seven hundred square inches into the forebay at present in use by said complainant, and so long as said complainant retains his present machinery and shall make no change therein whereby the quantity of said water shall increased; provided, that said complainant shall forthwith pay to said defendants the sum of one thousand and eighty-five dollars, as a bonus upon two hundred and seventeen additional square inches, and the sum of sixteen hundred and eighty-eight $\frac{72}{100}$ dollars as the arrears of rent due said defendants on four hundred and seventeen square inches to the 31st of December last, and shall continue to pay said rent quarterly on said 217 inches, according to the terms of his original lease filed in this cause.

By order of the court.

D. K. CARTTER.

Appeal to Sup. C't of the U. S. taken in general term.—Filed Oct. 27, 1870.

The defendant, by its solicitor, W. S. Cox, prays an appeal from the decree of this court of January 28, 1868, to the Supreme Court of the United States, and the same is allowed, and its bond for the prosecution of the same is approved.

By the court.

Appeal bond to S. C. U. S.—Filed Oct. 27, 1870.

Know all men by these presents that the Chesapeake and Ohio Canal Company and William W. Corcoran are held and firmly bound unto George Hill in the sum of five hundred dollars, to be paid to the said George Hill, his executors, , and assigns; to which payment, well and truly to be made and done, they bind themselves, their successors, heirs, executors, & ad., respectively, jointly and severally, firmly by these presents, sealed with their seals, and dated this twelfth day of October, A. D. 1870.

Whereas, the said Chesapeake and Ohio Canal Company hath prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered by the supreme court of the District of Columbia in a cause wherein said George Hill was complainant and said Chesapeake and Ohio Canal Company was defendant:

Now the condition of the above obligation is such, that if the said Chesapeake and Ohio Canal Company shall prosecute their said appeal with effect and answer all damages and costs if they shall fail to
70 make good their plea, then this obligation shall be void; it shall otherwise remain in full force and virtue at law.

JA'S C. CLARKE, [SEAL.]
President.

W. W. CORCORAN. [SEAL.]

Test:

BERRY FAWCETT, *Clk.*

Citation.—Filed Oct. 27, 1870.

In the supreme court of the District of Columbia. October 27, 1870.

GEORGE HILL, J'R, COMPLAINANT,
vs.
THE CHESAPEAKE & OHIO CANAL COMPANY, Defendant.
} In equity. No. 739.

To the complainant in the above-entitled cause:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to an appeal prayed by the defendant this day in open court here, from the decree of this court pronounced herein on the 28th of January, 1868, to show cause, if any there be, why the said decree should not be corrected and speedy justice done the parties in that behalf.

Witness, D. K. Cartter, chief-justice of the supreme court of the District of Columbia.

D. K. CARTTER,
Chief Justice.

Service of citation.—Filed Oct. 28, 1870.

1870, Oct. 28. I, George W. Phillips, deputy marshal of the U. S. for said district, make oath that, on the 28th day of Oct. 1870, I served on the appellee, the complainant in said cause, by exhibiting to him the above citation of appeal by defendant herein, and delivering him a copy thereof.

G. W. PHILLIPS,
Dep'ty Mar. D. C.

Sworn to and subscribed before me this 28th of Oct., 1870.

R. J. MEIGS, *Clerk.*
By L. P. WILLIAMS,
Ass't Clk.

(Indorsement on cover:) No. 442. The Chesapeake and Ohio Canal Company, appellant, vs. George Hill, j'r. Dist. of Columbia sup. court. Filed 23d December, 1870.

71 FARMERS AND MECHANICS' NATIONAL Bank of Georgetown, D. C.
vs.
GEORGE HILL, J'R.
} No. 3688. Eq. doc. 13.

OCTOBER 27TH, 1874.

Met pursuant to notice. Present, Charles M. Matthews, esq., solicitor for complainant, and Fred. W. Jones, esq., for defendant.

GEORGE HILL, J'r, a witness for defendant, being duly sworn, deposed as follows:

Examined by M'r Jones:

Q. M'r Hill, at the time that you purchased the property described in this suit, state what, if any, arrangement you had wtih George Shoemaker, the president of the then Farmers and Mechanics' Bank, in relation to the terms.

By M'r Matthews:

Q. M'r Hill, is M'r Shoemaker now dead?

A. Yes, sir.

(Counsel for complainant here objects to the question propounded by the counsel for the defendant as leading to a declaration of M'r Shoemaker, who is now dead.)

72 A. I had in contemplation this property now in question, and after it was advertised by the bank I talked with M'r Shoemaker about it—about the purchase of it; he recommended the purchase of it by me, stating that the bank would not want the money but the interest. Upon the assurance of M'r Shoemaker, I bought the property at public sale. I forget exactly what the terms of the sale were, but M'r Shoemaker did not require me to pay the full cash payment when the property was purchased. I had the assurance that I could pay the interest as long as I pleased and the bank would be satisfied. I bought the property and converted it into a paper-mill, and the verbal agreement of the bank was carried out for some years afterwards, until M'r Sweeny became president of the bank.

By M'r Jones:

73 Q. Here is a paper filed in this cause marked "Exhibit A," which I believe to be all the testimony taken in a former case in which you were the complainant and the bank the defendant, in which appears your testimony. Please state whether you adopt that as your testimony upon this occasion, and whether you wish to add to or take from it in any respect.

A. I adopt that as my testimony; it embraces everything.

(It is here admitted by the plaintiffs and defendant's solicitors that the original letters from the defendant to the complainant and from the complainant to the defendant in answer are truly set forth in the fifth paragraph of the defendant's answer, and were received and sent as therein alleged.)

Q. Has there been any demand made upon you for the principal of this debt, anterior to your filing the bill in cause No. 3214, doc.

74 12, supreme court of the District of Columbia?

A. There was no demand for the principal since the arrangement of the 10 per cent.

Q. Now state what that arrangement was and whether you have complied with it in any part.

A. On the 5th of July, 1872, I went into the bank and paid ten per cent. with the understanding that I should do that every year, and it was satisfactory to the bank. In April, the 23d day of April, 1873, I received a bill from the bank for the interest then due, which was $367, as near as I can recollect. There was no demand for any of the principal, that not being due until the first of July. Without any further notice, then, on the 1st day of May, my property was advertised for sale and this suit grew out of it. I am ready to pay the annual curtailment with interest and insurance, and always have been.

75 Cross-examination by M'r Matthews:

Q. This arrangement with M'r Shoemaker—when was it?

A. It was prior to the purchase of the property, a portion of it afterwards, because after the purchase of the property he did not require me to pay the whole cash payment.

Q. Have you not testified that the bank did not want any money, but wanted the interest?

A. Yes, sir; but I meant——

Q. How long did this arrangement with M'r Shoemaker continue?

A. Well, there was nothing said in reference to the property during M'r Shoemaker's times.

Q. What was his arrangement with you as to the continuance of the indebtedness?

A. That the bank wanted to dispose of the property and was willing that I should run them along in my own time as long as I paid my interest.

Q. You considered that as a valid arrangement, and acted upon it?

76 A. Well, I considered anything valid that M'r Shoemaker would say to me; I did not require a written agreement. I took his words.

Q. You considered that as a personal promise of M'r Shoemaker, and not a promise of the bank?

A. I considered it as a promise of the bank.

Q. How long was this arrangement acted under?

A. Until recently—until this 10 per cent. was demanded.

Q. You acceded to the demand of 10 per cent.?

A. Yes, sir.

Q. You had your own time in which to pay the debt?

A. I had the assurance of the bank that I should never be troubled for the money.

Q. When was this 10 per cent. arrangement made?

A. It was prior to July 5th, 1872.

Q. How long?

A. I cannot say.

Q. What induced not to pay the debt?

A. Because I understood that it was satisfactory to the bank.

Q. How did you so understand?

A. Through the director.

77 Q. How did you get that information?

A. By conversation.

Q. With whom?

A. M'r Esau Pickrell.

Q. When was that conversation?

A. I can' tell; prior to July 5th, 1872.

Q. Give us what he said.

A. Well, the conversation was with reference to my matter with the bank, and he gave me to understand that paying this 10 per cent. would curtail the debt 10 per cent. per year, and that it would be satisfactory to the bank, and when the six months' interest fell due, after the 5th of July, 1872, I went to M'r Pickrell about the interest, and asked him to have an understanding with the bank. He did so, and when I called upon him, he told me that the bank had agreed to hold the interest over for six months, and observed, at the same time, if I kept the 10 per cent. paid up, and the interest, the bank would be satisfied. That was

78 the last interview I had with M'r Pickrell on the subject, when this suit commenced with the bank.

Q. M'r Pickrell informed you that he was giving the action of the board of directors?

A. M'r Pickrell informed me, as far as the interest was concerned, that he was giving me the action of the board of directors, and remarked that if I kept the 10 per cent. paid up annually, and the interest, there would be no trouble with the bank. These were his words, as near as I——

Q. Gave you the action of the board all along?

A. Yes, sir.

Q. He swears that he did nothing of the kind.

A. On the morning of the meeting of the board, at my solicitation, he had the six months' interest extended, and he went up to the bank and reported to me that it was satisfactory to the board. As evidence of it, the demand was not made until the next interest was due, and the two payments were demanded at the one time.

79 Q. M'r Hill, what position did M'r Pickrell hold at the bank?

A. He was director.

Q. Did you ever receive any communication from the bank notifying you of the action of the bank?

A. Yes, sir.

Q. From whom did you receive this communication?

A. Generally, from M'r Shoemaker.

Q. Who was M'r Shoemaker?

A. M'r Shoemaker was acting then in the capacity of bookkeeper.

Q. What other position did he act in in the controversy between you and the bank?

A. He acted as trustee.

Q. Did, or not, he alone usually communicate with you?

A. M'r Shoemaker is the only officer of the bank who communicated with me upon the subject.

Q. He usually communicated the action of the board of directors?

A. Yes, sir.

80 Q. The fact that certain action had been taken?

A. The notice of the advertisement was conveyed to me by M'r Plater; that was the only notice that the property was to be advertised. The morning it came out, a copy of the advertisement was enclosed in an envelope, without any more upon the subject.

Q. You spoke of a demand having been made upon you in April, 1873; was anything accompanying that?

A. No, sir; there was nothing acompanying the bill; there were no comments about it.

Q. Were you requested to pay it at a certain time; if not, action would be taken?

A. No, sir; there was nothing—no such request. It was due upon the 21st of April, and I received it upon the 23d. The postmark was the 23d. It came to me through the post-office.

Q. Did the bank ever communicate with you otherwise than in writing?

81 A. If you can consider the bank communicating with me by my talking with the director—I ask' him to have something done for me, and it was done—in that way. I mostly made my propositions through the director.

Q. M'r Hill, substantially, your formal communications from the bank were through M'r Shoemaker, the bookkeeper, and trustee under this deed of trust?

A. Not all of them.

Q. In your talk with M'r Shoemaker, the old bank president, was the purpose for which you proposed to apply this property spoken of?

A. Yes, sir.

(It was agreed by counsel on both sides that all the papers in cause No. 3214, doc. 12, supreme court, District of Columbia, may be read as testimony, on hearing of this cause.

It is also admitted by the counsel on both sides that there is $150 due for insurance money.

82 The counsel for George Hill, j'r, admits that his indebtedness is $5,967.90, with interest from April 21st, 1872.)

GEORGE HILL, J'R.

Sworn to and subscribed before me this 27th day of October, 1874.

R. LEECH, *Auditor.*

83 Met pursuant to adjournment. Charles M. Matthews, esq., solicitor for complainant, and Fred. W. Jones, esq., solictor for defendant.

ESAU PICKRELL, being duly sworn, deposes and says:

Examined by M'r Matthews:

Q. You have heard the testimony of M'r Hill read. Is that testimony correct as far as it relates to declarations made by you to M'r Hill?

A. I don't understand that to be correct.

Q. Did you have any authority from the Farmers' and Mechanics' National Bank to make any such arrangement with George Hill, j'r?

A. No, sir.

Q. Did you propose, with or without authority, to make any such arrangement?

A. No, sir.

Q. You are a director of that bank?

A. I am; and have been for a number of years.

84 Q. Was or not, any such agreement ever proposed to be made by the bank with M'r Hill?

(Objected to by M'r Jones as leading.)

A. Not that I am aware of.

Cross-examination by M'r Jones:

Q. You were present at nearly all the meetings of the bank directors, were you not? I mean from 1866 to 1872.

A. No, sir; I was sick a great deal of my time and in my bed.

Q. Have you, however, kept the run or knowledge of the debt of M'r Hill to the bank and know the action of the bank respecting it?

A. I have not kept the run of the debt, but know the debt existed.

Q. Were you aware of the resolutions of the bank as mentioned in its answer, in cause No. 2114?

A. As to all these actions I am not; but in a general way I am.

Q. Did you not have frequent conversations with George Hill as to the action of the bank and as to the expediency of his complying

85 with their request; that is, as to the payment of interest and the curtailing of the principal?

A. I think I had. M'r Hill on several occasions asked me to make statements to the bank for him, which I did.

Q. Did you not afterwards report to M'r Hill the result of these communications to the board?

A. Yes; I think it is probable I did. It was simply a postponement of payment of interest.

Q. Do you remember the demand of the curtailment of 10 per cent. of the principal or about the time of its being made?

A. I can't say positively as to that.

Q. Did you ever converse with M'r Hill in respect to this 10 per cent. annual curtailment of the principal?

A. If I did, I have no recollection of it.

Q. Do you know how much has been paid on the principal of the debt?

A. I do not.

86 Q. How frequently did you see M'r Hill during these years, 1867 to 1872?

A. I cannot state. As often as M'r Hill called on me to make a representation I made it. I saw him nearly every day when I was not sick.

Q. About the time of the first difficulty between the bank and M'r Hill on account of this debt, did you not have a conversation with him, in which you desired that he should adjust the matter amicably; in which you stated to him that if he would pay the past due interest and the future interest promptly and the 10 per cent. curtailment on the principal that there would be no difficulty whatever, or words substantially to that effect?

A. No, I can't say so. I may have had a conversation with him in relation to interest, but the 10 per cent. curtailment I do not recollect.

Q. Have you been informed by any officer of the bank that M'r Hill did pay a 10 per cent. curtailment on the principal?

87 (Objected to by M'r Matthews, who admits the payment.)

A. I don't know anything of it.

Q. Then you are not, as a director of the bank, fully informed in regard to this debt?

A. No, sir.

Q. You know nothing as a director, of the various resolutions mentioned by the bank in its answer?

A. In a general sense I do; in a specific sense I do not.

Q. Now, I ask you if in a general sense you did not have with M'r Hill numerous conversations regarding this debt, in which you desired M'r Hill to settle up the interest, pay the curtailment, and have matters move along smoothly—stating that was all the bank wanted—or words to that effect?

A. For me to state that that was the bank wanted, would be assuming what I could not state. I told him to pay up his interest promptly, that that might be satisfactory; but I could not tell. I was very anxious for him to pay up his interest. I was very anxious

88 to see no trouble.

Q. Were you present when the resolution was passed requiring M'r Hill to reduce the principal ten per centum?

A. If I was, I don't recollect.

Q. Did you never hear of it?

A. If I did, I have forgotten it. I have no recollection of the ten per cent. curtailment.

ESAU PICKRELL.

Sworn to and subscribed before me this 31st day of October, 1874.

R. LEECH,
Auditor.

89 *Decree.—Filed Nov.* 16, 1874.

In the supreme court of the district of Columbia, the 16th day of November, 1874. In equity.

THE FARMERS' AND MECHANICS' NATIONAL Bank of Georgetown, D. C., plaintiff,
vs.
GEORGE HILL, JUNIOR, AND CHESAPEAKE and Ohio Canal Company, defendants.
} No. 3688. Docket 13.

This cause came on to be heard at this term and was submitted by

counsel; and thereupon, upon consideration thereof, it is by the court this 16th day of November, A. D. 1874, ordered, adjudged, and decreed that the bill in this cause filed be taken for confessed against the said defendant, The Chesapeake and Ohio Canal Company; that said real estate and premises, including said fixtures and machinery, and also said water-power, according as the same are referred to, mentioned, or described in said bill, be sold as an entirety, and as forming and
90 being a paper manufactory, according to a suitable description thereof, to be made for the purpose of sale by the trustees to be hereinafter appointed to make said sale; that Charles M. Matthews and Frederick W. Jones, esquires, be, and they are hereby appointed trustees to make said sale; and that the course of their proceedure shall be as follows:

They shall within fifteen (15) days from the date hereof file with the clerk of this court their bond in the penal sum of ten thousand (10,000) dollars, with security, to be approved by the court or a justice thereof, conditioned for the faithful discharge of their duties as trustees aforesaid. They shall then after advertisement to be made in two (2) or more daily newspapers printed and published in said district for three (3) weeks prior to the day of sale to be therein given, and also by posters or circulars as may seem proper to said trustees, make sale of the same at public auction to the highest bidder; said trustees to have
91 power to repeat and postpone the sale for cause appearing to them proper; that the terms of said sale shall be one-third (⅓) part thereof in cash at the time of sale, the residue to be paid in equal installments at one (1), two (2), three (3), and four (4) years, after date of sale, with interest thereon from said date until paid, at the rate of six per centum per annum, said instalments to be evidenced by promissory notes to be made payable to the order of the said trustees, or the survivor of them, and to be considered as secured by an implied lien on the property sold, the title to said property sold to be retained by said trustees, or the survivor of them, until said residue be fully paid; and, upon said full payment, said trustees or the survivor shall make conveyance of the property sold to the purchaser by a good and sufficient deed, and that said trustees shall make full report of their proceedings to the court for its further action.

92 Provided, however, that if the said defendant, George Hill, junior, shall within fifteen (15) days from the date hereof fully pay and discharge to the said plaintiff, or its certain attorney or assigns, all the debt, including principal, interest, and insurance due by him to said plaintiff according as the same is ascertained by the report of the auditor heretofore filed in this cause to be the sum of $5,967.90 and interest thereon from the 21st April, 1872, as also the sum of $150 insurance paid by said plaintiff for the defendant Hill, as also the cost of this proceeding, no proceedings shall be had under this decree.

By the court.

A. W.

93 *Trustees' bond.—Filed Dec.* 1, 1874.

In the supreme court of the district of Columbia. In equity.

THE FARMERS AND MECHANICS' NATIONAL Bank of Georgetown, D. C., plaintiff, —
vs.
GEORGE HILL, JUNIOR, AND THE CHESAPEAKE and Ohio Canal Company, defendants.
} No. 3688. Docket 13.

Trustees' bond.

Know all men by these presents that we, Charles M. Matthews, Frederick W. Jones, Henry M. Sweeney, and William F. Mattingly, of the District of Columbia, are held and firmly bound unto the United States of America in the sum of ten thousand (10,000) dollars, to be paid to the said United States of America, its certain attorney or assigns, to which payment, well and truly to be made, we and each of us do bind ourselves and each of us, our and each of our heirs, executors, and
94 administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this twenty-eighth day of November, A. D. 1874.

The condition of the above obligation is such that if the above bounden Charles M. Matthews and Frederick W. Jones, who by decree duly passed by the said court in the above entitled cause on the 16th day of November, A. D. 1874, were appointed trustees to make sale of a certain subject, do not well and truly perform their duties as said trustees, then this obligation shall be in full force and virtue; otherwise the same shall be null and void.

CHARLES M. MATTHEWS. [SEAL.]
H. M. SWEENEY. [SEAL.]
F. W. JONES. [SEAL.]
W'M F. MATTINGLY. [SEAL.]

Signed, sealed, and delivered in the presence of (the words, "ourselves and each of us," being interlined on page 1.)
LEVIN S. FREY.

Approved.

A. WYLIE.

95 *Decree affirming decree below.—Filed Jan.* 27, 1875.

In the supreme court of the District of Columbia. In general term.

FARMERS AND MECHANICS' NATIONAL BANK OF Georgetown, D. C.,
vs.
GEORGE HILL, JUNIOR, AND THE CHESAPEAKE and Ohio Canal Company.
} In equity. No. 3688.

This cause coming on to be heard, and being argued by counsel, it is this 27th day of January, 1874, ordered, adjudged, and decreed by the court in general term that the decree heretofore by the court in special term, on the 16th day of November, 1874, in this cause made, be and

the same is hereby affirmed at the costs of the appellant, George Hill, junior.

And the defendant George Hill, j'r, here, now, in open court prays an appeal to the Supreme Court of the United States, and the same is allowed.

96 In the supreme court of the District of Columbia, the 3rd day of Febr'y, 1875.

FARMERS & MECHANICS' NATIONAL BANK *vs.* GEORGE HILL AND THE CHESAPEAKE & OHIO Canal Company. } At law. No. 3688. In error.

Know all men by these presents, that we, George Hill and John T. Mitchell and George W. Cropley, are bound unto the above-named Farmers & Mechanics' National Bank in the sum of five hundred dollars, to be paid to the said Farmers & Mechanics' National Bank, its successors or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 3rd day of Febr'y, 1875.

Whereas the above-named George Hill hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named George Hill, j'r, shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) GEORGE HILL, J'R. [SEAL.]
JOHN T. MITCHELL. [SEAL.]
G. W. CROPLEY. [SEAL.]

Sealed and delivered in presence of--
F. W. JONES.

Approved Feb'y 4, 1875.

D. K. CARTTER,
Chief Justice.

(Indorsement on cover:) No. 313. George Hill, j'r, appellant, vs. The Farmers and Mechanics' National Bank. Dist. of Columbia sup. court. Filed 19th November, 1875.

REC. 313—4

IN THE

Supreme Court of the United States.

October Term—1878.

GEORGE HILL, JR., APPELLANT,

vs.

THE FARMERS' AND MECHANICS' NATIONAL BANK OF GEORGETOWN, D. C.

No. 54.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLEE.

Statement.

On or about the 21st day of October, 1863, the appellant purchased from the Farmers' and Mechanics' Bank of Georgetown, D. C., four contiguous lots of ground in said town, said lots being situated at the northeast corner of Water and Potomac streets, near to and south of the Chesapeake and Ohio Canal. Upon each of three of these lots there was a brick warehouse, and it was, at the time of said purchase, and in the negotiations with the Bank, contemplated by appellant to convert said warehouse into and apply all said real estate to the purposes of a paper-mill.

After negotiations with the said Bank, in regard to a

change in the terms of settlement for the purchase, conveyance of the real estate sold was, by the Bank, made to the appellant; the appellant, by a deed of trust dated January 15th, 1864, and duly recorded among the land records of said District, conveying the real estate, improvements, &c., purchased by him to Edward Shoemaker, his heirs and assigns, in trust to secure the payment to said Bank of three promissory notes, each dated October 21, 1863, each for the sum of $2,210\frac{33\frac{1}{3}}{100}$, payable, respectively, one, two, and three years after date, with interest, (at 6 per centum per annum,) interest payable semi-annually; said notes having been given for the unpaid purchase-money for the said real estate, improvements, &c., said appellant covenanting in said deed of trust during the continuance of the trust to make due payment of all public dues and taxes, and to keep the buildings on said real estate insured against loss by fire. It was provided in said deed of trust that until default be made in the payment of said notes and all instalments of interest, or in keeping said covenants, appellant should retain and enjoy the possession, use, and income from said premises. But on any default as to such payments or covenants, said Shoemaker should sell said premises at public auction, and after payment from the proceeds of sale of all expenses of sale, pay whatever might be due on said rates and on account of taxes and insurance, and pay the residue to said appellant.

The real estate purchased was by appellant converted into or applied to the purposes of a paper-mill, the motive power thereof being turbine wheels, driven by water introduced therein from the Chesapeake and Ohio Canal under a contract had with the Chesapeake and Ohio Canal Company on the 21st January, 1864, for water to be drawn by appellant from the canal at Georgetown, D. C., "to be used at his property at the corners of Potomac and

Water streets," and "to be used solely for propelling the machinery of a paper-mill and appurtenant works," on condition (among others) that if the water so drawn off should "be applied to any other use or purpose than as aforesaid," without special license, the supply thereof might be suspended until amends be made in the particular complained of. Appellant contends that the contract for this water was made before the purchase of the real estate, &c., and with reference to his contemplated purchase.

In February 1, 1872, the debt secured by the above deed of trust became the property of appellee, under an assignment from the trustees of the Farmers' and Mechanics' Bank. There is unpaid of said debt $5,967.90, and interest at six per centum per annum from April 21, 1872, and on the 24th October, 1874, the sum of $150 was due for insurance.

It is consented that all the papers in the case of George Hill, Jr., *vs.* The Farmers' and Mechanics' National Bank of Georgetown, D. C., *et al.*, No. 3214, Equity docket No. 12, of the Supreme Court of the District of Columbia, may be read in this cause.

Appellee having, by reason of the default of the appellant in respect of his indebtedness, advertised *only said real estate* and the warehouses, under the deed of trust, and having purchased in the same; on a bill filed in said cause, No. 3214, Eq. docket No. 12, to set aside said sale, the court (1 MacArthur, 310) said as follows:

"In this case the court have unanimously come to the conclusion that the sale should be set aside. The reason stated in the bill for setting aside the sale is that it took place under a deed of trust, and that the property, which consisted of four lots of ground, was sold collectively when it should have been sold in parcels. The sale of trust property as a whole, when it is capable of being divided, and when serious damage has been occasioned by selling

in that manner, furnishes just ground in a court of equity for relief. But this does not constitute the gross error of the sale in this case. At the time the deed of trust was executed, the buildings upon the premises consisted of two brick warehouses and a dwelling-house. The complainant placed in these structures, at great expense, all the machinery necessary to a paper-mill, and procured from the Chesapeake and Ohio Canal Company a water power, which he conveyed under ground some three or four hundred feet to the mill property for the purpose of operating the machinery, and also incurred heavy expense for an underground tail-race to conduct the water away. He estimates that he has expended thirty thousand on these objects. The property thus improved and consolidated was, according to the uncontradicted testimony, worth from $40,000 to $80,000. The great mischief done by the sale, as we think, was not in selling the lots together, but in selling them without reference to the fixed machinery and water power connected therewith. The result is that, for $7,000, this valuable mill property has been destroyed. The machinery and water power of the mill has been rendered worthless. We are governed in our conclusion in setting aside this sale by the fact that both parties had a right to permanent improvements upon the premises, so far as the same were inalienably fixed upon each other, and that there was no exclusive right of either to separate or divide them.

"Under the prayer for general relief we think the sale ought to be set aside, so that the property, without destroying any constituent part of it, may be brought into market and sold for what it is worth. We therefore set it aside, and leave both parties at liberty to apply to the special term to have their rights in the property correctly adjusted."

The bill in the present case was filed April 11, 1874, shortly after the entry of the decree in said cause No. 3214, Eq. Docket 12.

In this present case a decree was, after argument, en-

tered on the 16th November, 1874, for the sale of the "real estate, premises, including fixtures and machinery, and said water-power, according as the same are referred to, mentioned, and described in said bill, to be sold as an entirety and as forming and being a paper manufactory," time being in said decree given appellant to make payment of the amount due and unpaid, in the event of which said payment no proceedings were to be had under said decree.

From this decree appellant appealed to this court, and the appeal was allowed.

For the affirmance of the decree appealed from the appellee would rely upon the following

Points of Law and of Fact.

Appellant's answer presents the following objections to the relief prayed for in the bill in this cause filed:

I. That the amount, $5,967, represented by notes maturing in 1864, 1865, and 1866, and interest thereon from April 21st, 1872, though unpaid, is not due and payable by appellant, because:

1. The president of the Farmers' and Mechanics' Bank, at or about the time of the sale in 1863, agreed with him that he could pay the principal debt as he felt himself able.

Record, (answer, § 5,) page 8.

Appellee took these notes subject to this agreement.

Record, (answer, § 4,) page 8.

2. Appellee, by resolution in 1872, agreed to accept ten per centum per annum of the principal, provided interest was promptly paid.

Record, (answer, § 5,) pages 8 and 9.

II. That the lot known upon the plat (R., page 7) as 4

is wholly unnecessary to and disconnected from said paper factory.

Record, (answer, § 3,) page 6.

III. That the motive power, machinery, and fixtures annexed to said premises, some parts of which can be removed without damage to the freehold or the bulk of the machinery, some of which was placed there after the execution of the deed of trust, are not covered thereby or liable thereunder, being movable property, not permanently affixed to the freehold, and placed there for the prosecution of his own special and particular business, and for no other purpose.

Record, (answer, § 3,) page 7.

Of these objections in their order.

I.

1. The alleged agreement had by appellant with the Farmers' and Mechanics' Bank has not been proven.

Allegation as to this agreement is made by the appellant in section 5 of his answer, (Record, page 8,) and in his testimony, (Record, page 42,) the auditor stating (Record, page 11) that appellant was the only witness testifying to said agreement.

We have, then, the answer of the appellant, unsupported by any other than his own testimony, the allegations of this answer having been denied by the replication of the appellee. (Record, page 10.) This averment being new matter, not responsive to anything in the bill, it must, according to the ruling of Roach *vs.* Summers, (20 Wallace, 170) be sustained by proof to be of any avail as defence.

It will be also noted that this alleged transaction was

had with an officer of the bank, who had died before the filing of the bill in this cause, the agreement being testified to as a verbal one, (Record, Hill's testimony, p. 42,) no written contract having been either produced or called for, and the testimony being as to a matter occurring some nine years before the taking of the testimony in this cause. It does, however, appear that, although Mr. Shoemaker (for the bank) is alleged to have agreed that the money (principal) was not wanted, but only the interest, yet that he required a cash payment from appellant.

Record, Hill's testimony, page 42.

2. If this agreement be considered proven, it was made before the execution of the deed of trust of January 15, 1864, or December 21, 1863, the date of the notes secured thereby.

Appellant in his testimony (Record, page 42) says: "After the property was advertised I talked with Mr. "Shoemaker * * about the purchase of it. He recommended the purchase of it by me, stating that the bank "would not want the money but the interest. Upon the "assurance of Mr. Shoemaker I bought the property at "public sale." He further (p. 42) testifies that this arrangement was made "prior to the purchase of the "property, a portion of it afterwards, because after the "purchase of the property he did not require me to pay "the whole cash payment."

Such agreement is inoperative to vary the effect of the deed of trust of January 21, 1864, securing the notes dated October 21, 1863.

In Hunt *vs.* Rousmanier's administrators, (8 Wheat., 211,) the court says: "It is a general rule that an agreement in "writing shall not be varied by parol testimony stating "conversations or circumstances anterior to the written

" instrument. This rule is recognized in courts of equity " as well as in courts of law."

See also Sprigg *vs.* Bank, 14 Peters, 206.

In Emerson *vs.* Slater (22 Howard, 41) this court (Justice Clifford delivering the opinion) decides "that verbal " agreements between the parties to a written contract, " made before or at the time of the execution of the con- " tract, are in general inadmissible to vary its terms or " affect its construction. All such verbal agreements are " considered as merged in the written contract."

For the same principle see Partridge *vs.* Ins. Co., (15 Wallace, 579.)

In Insurance Company *vs.* Lyman (15 Wallace, 670) it is said: "The doctrine is too well settled that all previous " negotiations and verbal statements are merged and ex- " cluded when the parties assent to a written instrument " as expressing the agreement."

Also, Specht *vs.* Howard, 16 Wallace, 566.

Forsythe *vs.* Kimball, 1 Otto, 294.

3. It is not proven in this case that appellee by resolution or otherwise, in 1872, or at any other time, agreed to accept ten per centum per annum of the principal amount provided interest was promptly paid.

Appellant, in his answer, § 5, (Record, page 8,) makes allegation of this agreement and the action of the appellee thereunder.

This being new matter in his answer, and not responsive to anything in the bill, is of no avail except supported by proof.

Roach *vs.* Summers, 20 Wallace, 170.

Appellant testifies (Record, page 43) that the agreement as to the ten cent. payments was made prior to 5th July,

1872, and that notice of this action was verbally given to him by Mr. Pickrell, one of the directors of the appellee; at the same time (page 44) swearing that all formal notices of the action of the Board of Directors were communicated to him by the book-keeper of the appellee; and that no communication was ever had with him by the appellee except in writing.

Mr. Pickrell, (the director alluded to by appellant,) in his testimony, (Record, page 45, 46,) utterly denies all knowledge of any such arrangement as is claimed by appellant to have been made, or that any such communication was by him made as appellant claims was made.

It is, however, submitted that even though the proof should have established the verbal agreements alleged to have been made, the one before and the other after the time of the making of the written agreement between the parties, and a new and valuable consideration should have been from the proof found for the latter verbal agreement, still they could not avail to vary the terms of this written agreement.

This agreement was one for the sale of lands; the deed of trust recites the notes to have "been given for the unpaid purchase money" of the real estate in that deed described; it therefore falls within the provisions of the statute of frauds.

In Emerson *vs.* Slater, (22 Howard, 41,) it is said, "oral "agreements subsequently made on a new and valuable con- "sideration, in cases falling within the general rules of the "common law, and *not within the statute of frauds*, stand "upon a different footing. Such subsequent oral agree- "ments *not* falling within the exception mentioned, may "vary the terms of a written contract or discharge it alto- "gether." Again, p. 42: "the better opinion is, according "to the weight of authority, that a written contract within

" the statute of frauds cannot be varied by any subsequent " agreement of the parties unless such new agreement is " also in writing."

II.

It cannot be contended that the lot marked No. 4 upon the plat is wholly unnecessary to or disconnected with said paper-mill.

There was no intended separation of this parcel from the others at the time of the purchase. No special or separate account was made thereof in the settlement, which was made in gross; and it will not be denied that over this lot, intervening as it does between the mill buildings on the south and the canal on the north, the water passes which furnishes the motive-power to the works.

III.

Are the motive-power and the machinery of the paper-mill fixtures covered by the deed of trust? Will they pass under a sale had thereunder?

The testimony of appellant is, (Record, p. 44,) that this property was purchased to be converted into and used as a paper-mill.

The agreement had with the Chesapeake & Ohio Canal for the use of water provides that it shall be used at this property and for the purposes of a paper-mill. (Record, p. 17.) The appellant in his answer, § 3, (Record, p. 7,) alleges that the motive-power is water from the canal, and that the machinery was placed upon said premises for the prosecution of his particular business, and for no other purpose.

The leading case of Elwes *vs.* Mawe (3 East., 38) establishes the principle that whatever is erected by the owner

of the freehold for the benefit of the inheritance belongs to the heir, as against the executor claiming the personalty, and in the comments thereon in 2 Smith's Leading Cases, 269, it is stated that—

Whatever is essential to the particular use to which the realty is applied at the time when the question arises shall be considered a fixture, even when the connection between them is such that it may be severed without physical or lasting injury to both. Citing—

Lawton *vs.* Salmon, 1 H. Bl., 259.

Again—2 Sm. Lead. Cases, 268: The general course of decision is in favor of viewing everything as a fixture which has been attached to the realty, with a view to the purposes for which it is held or employed, however slight or temporary the connection between them.

Again: It has accordingly been decided in a great number of cases that the machinery of a manufactory is to be regarded as a part of the realty, whether it be attached to the body of the building or merely connected with the other machinery by bands or gearing, which may be thrown off at pleasure or without injury to the freehold.

Kirwan *vs.* Latour, 1 H. & J., 289.
Powell *vs.* Monson, 3 Mason, 467.

In general terms we think it may be said that when a building is erected as a mill, or the water-works or steam-works which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, though not at the time of the mortgage attached to the mill, are yet parts of it, and pass with it by a mortgage. Citing—

Buckley *vs.* Buckley, 11 Barbour, 43.
McKim *vs.* Mason, 3 Md. C. Dec., 186.

Tuell *vs.* Fuller, 28 Maine, 545.
Corliss *vs.* McLay, 29 Maine, 115.
Winslow *vs.* Ins. Co., 4 Metcalf, 306.

Other cases seem to establish the principle that whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their own nature and their adaptation to the purposes for which used.

In Walmsley *vs.* Milne, 97 E. C. L., (7 C. B. R. N. S.,) 129, a case between the assignee in bankruptcy of the mortgagor and the mortgagee, Crowder, J., citing Hallowell *vs.* Eastwood, (6 Exch., 295,) says:

"It is said that whether a chattel attached to the soil "was a fixture was always a question of fact, depending "upon circumstances, and principally on two considera- "tions: first, the mode of annexation, and whether easily "removed or not without injury to itself or the building; "and, secondly, the object of the annexation, whether for "the permanent and substantial improvement of the dwell- "ing, or merely for a temporary purpose, and the more "complete enjoyment and use of it as a chattel."

These principles were applied to the case then being considered, the question being whether a steam-engine, boiler, hay-cutter, mash-mill, corn-crusher, and a pair of grinding stones, (all capable of being moved without injury to themselves or the premises,) passed to the assignee in bankruptcy of the mortgagor, as against the mortgagee, those articles having been placed in the premises after the execution of the mortgage, which articles were so placed for the convenience of his business as an innkeeper, brewer, and bath proprietor.

The court said: These articles "were all firmly fixed to "the freehold for the purpose of improving the inheritance,

" and not for a temporary purpose." " The bankrupt was " the real owner of the premises, * * * * erected " baths, &c., and then supplied them with the fixtures in " question for their permanent improvement."

Therefore, the appellant, having before the purchase of this property negotiated with the Canal Company for the water necessary to the motive power of a paper-mill to be thereon established, and purchasing the real estate, &c., with the intention of converting the same into a paper-mill, and afterwards supplying the necessary machinery therefor, claiming special indulgence from this vendor, in the interest of manufactures in the town; his contract with the Canal Company restricting the use of the water to the purposes of a paper-mill and none other, and afterwards securing an enlargement of his grant in view of this specially-intended use, it is submitted that this motive power and machinery are to be regarded as a part of the property, and covered by the mortgage, though not at the time of the giving thereof attached to the mill, and will pass under a sale had under said mortgage.

Assuming, then, that all objections to the affirmance of the decree have been disposed of, and shewn not to be well founded, either in law or in fact, in what position does the appellant stand before this court?

As a purchaser in 1863 of about $8,000 of partly improved real estate, the last note given therefor maturing in 1866, only ten per centum of the principal has been paid, and interest at six per centum per annum is due since April, 1872, the appellee being under the necessity, for its protection, of even paying the accruing premiums of insurance, which, under covenants, should be paid by the appellant.

This is the second suit which has been deemed necessary for the collection of the amount due, and in this the chief

reason urged why such delay has been had is, that under agreement had with a party, (since dead,) payment was to be made when appellant felt himself able to make a settlement. On such a pretext, and one other, and which other the witness named by him failed to prove, has he for twelve years and more occupied property costing him but the trifling sum of about $8,000, representing that he has been unable to pay therefor, making fitful payments of interest up to 1872, when during that time, according to his own statement, and at his cost, machinery and other fixtures have been placed therein and added thereto to such extent that the present value of the mill is some $40,000, and during which time the work has presumably been in profitable operation.

It is submitted that such objections as have been urged can hardly avail against the collection of the claim involved in this suit, and their puerile character, and the utter failure to establish either by the proof, will, it is hoped, illustrate the character of this proceeding, and invoke from this court the rebuke which it should receive; and the appeal in this case having delayed the proceedings in a decree of a court of chancery for the payment of money, and the appeal appearing to have been taken merely for delay, it is asked that damages as prescribed by sections 2 and 3 of rule No. 23 of the Supreme Court of the United States shall be awarded in favor of the appellee.

CHARLES M. MATTHEWS,
for Appellee.

In the

Supreme Court of the United States.

GEORGE HILL, JR., *Appellant*,
vs.
THE FARMERS AND MECHANICS' NATIONAL BANK.

No. 84, October Term, 1878.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLANT.

F. W. JONES,
For Appellant.

Byron S. Adams, Printer.

IN THE

Supreme Court of the United States.

GEORGE HILL, JR., *Appellant*,

vs.

THE FARMERS AND MECHANICS' NATIONAL BANK.

BRIEF FOR APPELLANT.

I.—Statement.

This was a bill to enforce the execution of a deed of trust given as security for a debt.

The deed is dated January 15th, 1864, and will be found at page 3 of the Record. It conveys four several lots of ground in Georgetown, in this District, the first two being described as each improved by a two-story brick warehouse.

After the execution of the deed of trust, the appellant converted part of the property into a manufactory of paper, setting up the requisite machinery, and introducing, as a motive power, water obtained from the canal of the Chesapeake and Ohio Canal Co., and carried underground to the manufactory.

The change thus made in the property after the deed of trust gives rise to the present controversy. The bill avers that all the property was converted to the purposes of a paper manufactory, (par. 3, R., p. 2.) The answer puts in issue this averment and avers that lot 4, (see plat, R. 7,) being more than one-half the property, is wholly unnecessary to and disconnected from the factory. (Answer, par. 3, R. 6.)

The bill further claims that all the machinery is subject to the deed of trust, because annexed to the freehold. (Same par., R. 2.) The answer denies this averment and alleges that some of the machinery is not permanently annexed to the freehold, and capable of removal without injury to the freehold or the rest of the machinery, and was placed in the factory for special purposes. (Answer, par. 3, R. 6, 7.)

The bill further claims that the water-power obtained from the Canal Company became appurtenant to the mortgaged property and liable to sale under the deed of trust. (Pars. 6 and 7, R. 2.)

The answer denies and puts in issue this pretension. (Answer, pars. 6 and 7, R. 9.)

On the 11th of June, 1874, the replication was filed, (R. 10,) and on the 7th of July, 1874, the cause was referred to the Auditor to ascertain: 1. The indebtedness of the appellant; 2. The value of the premises with the machinery and water-power; and, 3. To hear and report evidence in relation to an agreement for indulgence alleged in the 5th paragraph of the appellant's answer. (R. 9.)

The report of the Auditor (R. 10 and 11) was confined to the points of reference. The evidence given before the Auditor was likewise confined to those points, and will be found in R. 12-13 and 41-46. No other evidence was adduced by either party, except that the transcript of the Record in a cause of George Hill, Jr., *vs.* The Chesapeake and Ohio Canal Co. was filed, (R. 14-41,) and this transcript containing the

water-lease to the appellant from the Canal Company of the motive power, (R. 16-20,) furnishes the only pretext for contending that the motive-power became appurtenant to the land, and hence liable to sale under the deed of trust.

With this exception the above-mentioned issues as to the connection of lot 4 with the factory premises, and the relation of the machinery to the freehold, and also whether the motive-power was appurtenant to the land, were left wholly unenlightened by any evidence.

In this state of the pleadings and proofs the Court decreed that the whole property, including lot 4 and all the machinery and also the motive-power, should be sold as an entirety and as forming a paper manufactory. (R. 46-47.) This decree having been affirmed in General Term, an appeal was taken to this Court.

II.—Assignment of Errors.

The Court below erred:

1. In decreeing the sale of lot 4 in common with the other lots used for the purpose of the manufactory.

2. In decreeing the sale of machinery not permanently annexed, without evidence as to the mode, object and intention of annexation.

3. In decreeing the sale of the water-power as ~~an~~ appurtenant to the land.

III.—Argument.

Four several lots were conveyed by the deed of trust. (Bill, folio 2; deed, folio 11.) A sale in mass is *prima facie* not

within the deed, but to sustain such a sale its justice and expediency must be shown.

Nesbitt *vs.* Dallam, 7 G. & J., 512.
Woods *vs.* Monell, 1 Johns. Ch., 411.
Stead's Ex'rs *vs.* Course, 4 Cranch, 403.
Jackson *vs.* Newton, 18 Johns., 355.
Ryerson *vs.* Nicholson, 2 Yeates, 516.
Rowley *vs.* Browne, 1 Binney, 62.
Berry *vs.* Griffith, 2 H. & G., 337.

Indeed, a sale under this very deed was set aside by the Court below, because it was a lumping sale.

Hill *vs.* Shoemaker, 1 MacArthur, 305.

To support a decree for such a sale the bill alleges that the whole property was converted into a manufactory. (Par. 3, R. 2.) But this is distinctly put in issue by the answer, (par. 3, R. 6,) and there is not a particle of proof offered to sustain the allegation of the bill. The proposition that such a material allegation denied and put in issue must be proved is elementary.

The brief filed in behalf of the appellant seeks to avoid the conclusion that lot 4 cannot be decreed to be sold by the assertion that the water for the factory passes over the lot. The record, however, nowhere shows this to be the case, and in point of fact the water is carried under Potomac street and delivered on lot 3. (See map, R. 7.)

Passing to the other and more important errors.

The case is one between mortgagor and mortgagee. After the mortgage the former converted part of the property mortgaged into a paper factory, and put up machinery and obtained a lease of water as a motive power, and the question is, whether the machinery and water-power can be sold under the mortgage.

As essentially different considerations belong to the machinery and the water-power, their relation to the property mortgaged will be separately examined.

As to the machinery:

The allegation of the bill is that it was annexed to the premises and hence is subject to the deed of trust. (Par. 3, R. 2.) The answer puts this allegation in issue, and denies that all of the machinery is permanently annexed, and avers that a portion is removable without injury to the freehold, or the rest of the machinery, and was placed in the mill for special purposes. No evidence whatever is adduced.

In Voorhees *vs.* McGinnis, (48 New York,) the question of fixtures as between mortgagor and mortgagee is ably and elaborately examined. The Court, Judge Hunt delivering the opinion, lays down the following rules:

"1. The rule is quite uniform that to give to articles, personal in their nature, the character of real estate, the annexation must be of a permanent character. There are exceptions to this rule, in those articles which are not themselves annexed, but are deemed to be of the freehold from their use and character, such as millstones, fences, statuary and the like. (*Potter* vs. *Cromwell*, 40 N. Y. R., 287; *Capen* vs. *Peckham*, 35 Conn. R., 88.)

"2. A second test, but not so certain in its character, is that of adaptability to the use of the freehold. (*Voorhis* vs. *Freeman*, 2 Watts & S., 116; *Pyle* vs. *Pennock*, id., 390.)

"3. A third test is that of the intention of the parties at the time of making the annexation. (*Potter* vs. *Cromwell*, *supra*; *Murdock* vs. *Gifford*, 18 N. Y., 28; *Winslow* vs. *Merchants' Sun Co.*, 4 *Metc.*, 306; *Swift* vs. *Thompson*, 9 Conn. R., 63; *Capen.* vs. *Peckham*, 35 Conn. R., 88.)

"The circumstance that the machinery may or may not be removed without great injury to building or itself, is not now

deemed to be controlling. In *Potter* vs. *Cromwell*, (*supra*,) the tests are declared to be, first, actual annexation; second, the use or purpose of the application of the machinery; third, the intention to make the annexation a permanent accession to the freehold."

In this case all the authorities are examined.

The same tests were adopted by the Supreme Court of Ohio in *Teaff* vs. *Hewitt*, 7 Ohio State, 511, 529–30.

And see, also, Hill on Fixtures, §§ 6, 7, 8, 9, &c., and authorities; Van Ness *vs.* Packard, 2 Pet., 137.

Now, in the present case, in the utter absence of any circumstances to show the mode or character of annexation, or the object of the annexation, or the intention or purpose with which it was made, the court declared all the machinery part of the realty, and decreed it to be sold as such.

As to the water-power:

The agreement with the Canal Co., or water lease, (R. 16, 17,) allows the appellant *and his assigns* to draw from the canal for the period of twenty years from July 1, 1864, a certain quantity of water, to be used at his property at the corner of Potomac and Water streets, for the sole purpose of propelling a paper-mill. The use of the water for any other purpose, without the special consent of the lessor, signified in writing under seal, is declared by the lease to be cause for cutting off the supply of water. (R. 19.) It is plain, however, that the water may be used for other purposes with such consent.

The lessee (R. 18) covenants for himself and his assigns to pay the rent during the term. (R. 19, 20.) The lessor covenants to renew the lease for another term of twenty years if requested by the lessee or his assigns.

The motive power thus leased after the deed of trust was held by the court to be appurtenant to the land, and decreed to be sold.

When and how did it become appurtenant? It is demonstrable that by the above agreement the right to use the water did not become appendant or appurtenant to the property mortgaged. The grant of the water is a grant to the appellant and *his assigns* for twenty years. Upon his death the easement would pass to his *personal representatives* and the land *to his heirs.* The grant is not made to the lessee as *owner*, nor in respect of *any estate in the property.* The property is mentioned simply as restricting the use of the water to a certain place, as such use is also restricted to a certain purpose. This purpose may, by express stipulation, be changed with the consent of the lessor, so that the question is whether a grant to a man and his assigns of water to be used at a certain place becomes appendant to the estate in that place. The terms of the grant in respect of place would, it is evident, be satisfied without any estate whatever in the place where the water is to be used. The license of the owner would be as efficacious to enable the lessee to use the water as a fee-simple title, or if the lessee used the water without either estate in the place or license from the owner he could not be said to violate any rights of the lessor.

The lessor had no purpose in attaching the easement to the land, and has not done so. The lessee has, however, personally covenanted to pay rent, and, after the sale of the water-power under the decree, will continue to be responsible upon that covenant. It seems, then, plain beyond question that the agreement does not attach the water-power to the land, but that the grant is personal only, or in gross.

That the right to water in an aqueduct may be created so as to exist in gross and independently of any particular parcel of land owned by the grantee, and that such right is assignable, descendible, and devisable, see *Angell on Watercourses*, 7th ed., 1877, § 143, and cases set out in notes.

The cases of Goodrich *vs.* Burbank, 12 Allen; Lansdale Co. *vs.* Moses, 21 Law R., p. 664; and Amidon *vs.* Harris, 113

Mass., 59, there cited, are identical with the present, and the last two show that restriction as to place of use does not charge or make the easement appurtenant. (See also Washburn on Easements, marginal pages 10 and 313.) If the grant is in gross, the error in the decree in ordering the sale of lot 4 is the more oppressive.

Assuming that the water-lease did not attach to the realty the right to the water, has the lessee done so by any act? It is not pretended that he has. Such an assignment could only be by deed, devise or record.

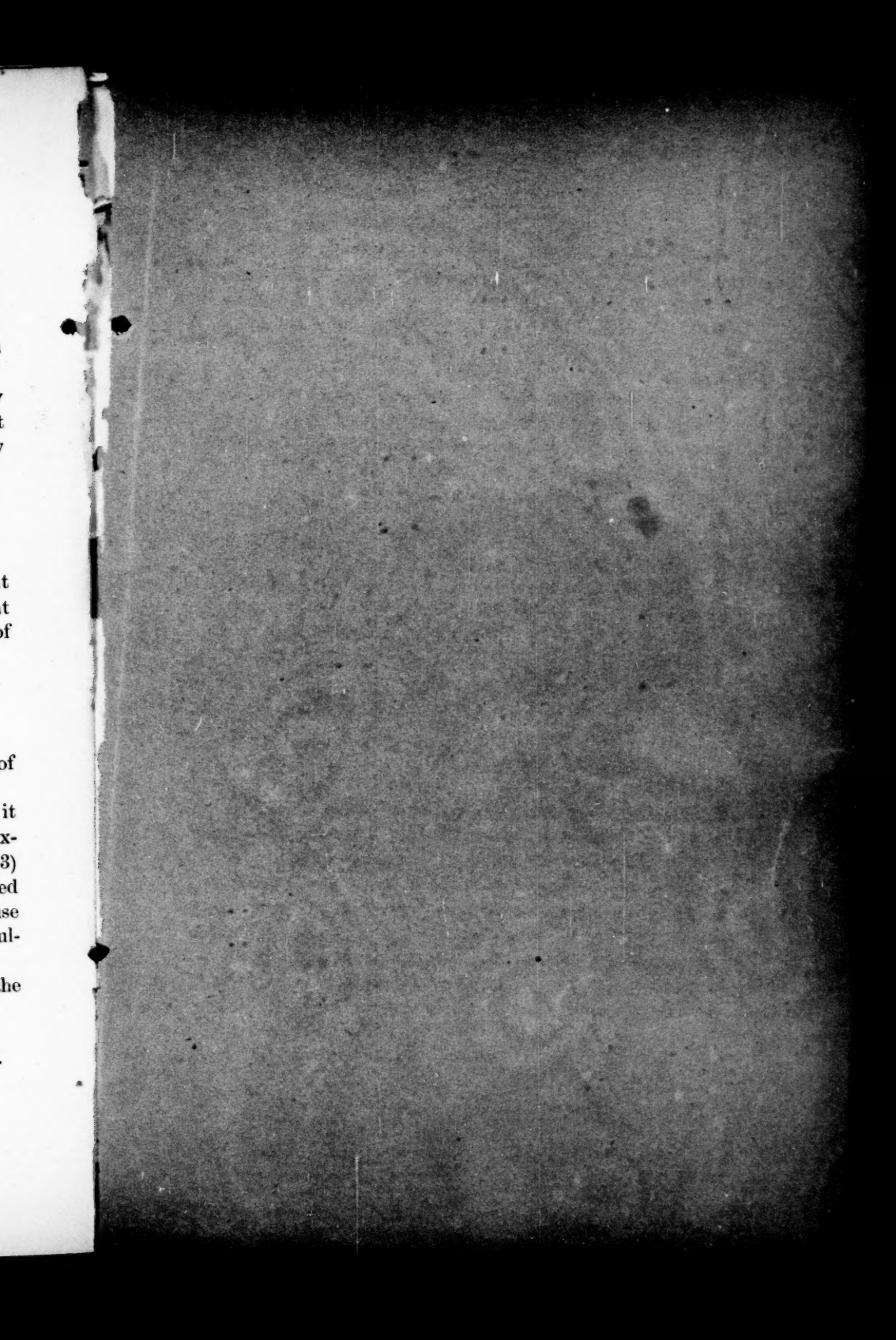
Angell on Watercourses, *Sup.*, §§ 168, 169.
Washburn on Easements, pp. 18, &c.

Such an assignment being of an incorporeal hereditament in the land of the Canal Company, or what is equivalent thereto, and exceeding three years, is within the Statute of Frauds.

Angell on Watercourses, *Sup.*
Browne on Frauds, s. 232.

It is difficult to understand what is meant by the claim of ten per cent. damages.

This case, a decree in equity, is not within the rule. If it were, the decree is not only against law, but in respect to expediency is unjust and oppressive. The bill avers (par. 7, R. 3) that the sale could not be made until the Court determined whether the water-power is appurtenant or not; and because the appellant presumes to question the correctness of the ruling below, it is proposed to mulct him here in damages.

It is submitted that the decree should be reversed on all the grounds of error.

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